Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994.

José M. Tous Rodríguez
Petitioner

vs.

Héctor Cuevas Cuevas and his wife Margarita Guzmán and their conjugal partnership, Héctor Cuevas Ramos and his wife Annette Román and their conjugal partnership, Continental Supplies, Corp., Efraín Ortíz and his wife María Guzmán, Miguel Elías Boneta and his wife Luisa Caborrovy and their conjugal partnership.
Respondents

Petition for Writ of Certiorari
to the United States Court of Appeals for
the First Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

A. Whether the district court acted without jurisdiction and in conflict with Cohen v. Beneficial Industrial Loan, Corp., infra, by reversing a final order of a previous judge, which was not appealed, under the purview of 28 U.S.C. Sec. 1291, giving leave to petitioners to make a discovery in order to oppose a motion to dismiss, and also allowing the filing of an amended complaint in order to comply with Rule 9 (b) of Federal Civil Procedure, when at the same time a judgment by default entered against respondents was lifted.

B. Whether the circuit

court's reasoning as to undue delay constitute an abuse of discretion and contradicts the Supreme Court's decision in Foman v. Davis, infra; when in the case at bar leave was granted to conduct a discovery and to file an amended complaint; and at the same time a judgment by default was lifted to respondents; the cases cited in the opinion do not relate with the case at bar and the finding of undue delay is not supported by the record.

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Opinion Below

The opinion of the court of appeals, on September 6, 1994, case number 94-1377, was not reported. See Appendix 1. The denial to a petition for rehearing was entered on October 20, 1994. See Appendix 2. The judgment of the district court, case number 90-2625 (PG), was entered on February 23, 1994. See Appendix 3.

Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. Sec. 1254 (1).

STATUTORY PROVISIONS INVOLVED

The statute that governs the present case is the Racketeering Influence and Corrupt Organizations Act, 18 U.S.C. Sec. 1961:

(1) Racketeering activity means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene

matter, or dealing in narcotic or other dangerous drugs, which is chargeable under state law and punishable by imprisonment for more than one year; (B), any act which is indictable under any of the following provisions of Title 18, United States Code: 1341 (relating to mail fraud) (2) State means any State of the United States [....] the Commonwealth of Puerto Rico. (3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which

occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 U.S.C. Section 1962 (c) (d).

Prohibited Activities.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions or subsections (a), (b), or (c) of this section.

18 U.S.C Section 1964 Civil Remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover three fold damages he sustains and the cost of the suit, including a reasonable attorney's fee.

28 U.S.C. Sec. 1291:

The Court of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, except where a direct review may be heard in the Supreme Court. The jurisdiction of the U.S. Court of Appeals for the Federal Circuit shall be limited to the

jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

Rule of Appellate Procedure 4 (1):

In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of the entry of the judgment or order appealed from;[....]"

Puerto Rico Statutory Provisions

Puerto Rico Penal Code, 1974, 33 L.P.R.A. Secs. 4271, 4272:

Sec. 4271. Unlawful Appropriation

Any person who unlawfully appropriates, without violence or intimidation, personal property belonging to another person, shall be punished [....] (Amended by Law No. 101, June 4, 1980, p.279.)

Sec. 4272. Aggravated Unlawful Appropriation

Any person committing the offense described in section 4271 of this title shall be punished by imprisonment for a fixed term of ten (10) years, whenever the following circumstances exist:

(a) [* * * *]

(b) Unlawfully appropriating the property of another valued in two hundred dollars or more;

(c) [* * * *]

(d) [* * * *]

In any of the preceding circumstances, should there be aggravating circumstances, the fixed penalty established may be increased to a maximum of twelve (12) years; if there should be extenuating circumstances, it may be reduced to a minimum of six (6) years. The court may impose the penalty of restitution in addition to the established penalty of imprisonment, or both penalties. Amended by Law No. 57,

June 3, 1983, p.121.

STATEMENT OF THE CASE

The petitioner commenced this RICO Act action (18 U.S.C. Sec. 1962 et seq.) in the United States Court for the District of Puerto Rico in December 18, 1990, along with petitioner's business corporation, not included in this certiorari, on clerk's office request, because petitioner is appearing pro hac vice, and the damages sustained by petitioner is on his business.

The sequence of the case is as follows:

An order was entered on January 3, 1993, where district court Judge Gilberto Gierbolini disposed of a controversy around a discovery requested by petitioner José M. Tous, Inc., et al., to amend his complaint and oppose a motion to dismiss in order to comply with Rule 9 (b) of Federal Civil Procedure. In the same order Judge Gierbolini lifted a

judgment by default against defendants entered before their motion to dismiss. The order following partially a magistrate's report and recommendation reads partially as follows:

> "The motions to vacate the entry of default against them, filed by defendants Continental Supplies, Inc., Efraín Ortíz, María Guzmán and their conjugal partnership, Héctor Cuevas Cuevas, Margarita Guzmán and their conjugal partnership, Héctor Cuevas Ramos, Annette Román and their conjugal partnership, and Family Restaurant, Inc., are hereby GRANTED and the default entered against these defendants by the clerk's office on June 11, 1992 is hereby VACATED AND SET ASIDE".
>
> "Also pending before us is an August 11, 1992 motion to dismiss

the second amended complaint filed by defendants, Cuevas Cuevas, his spouse Guzmán, and their conjugal partnership, Cuevas Ramos, his spouse Román, and their conjugal partnership, and Family Restaurant, Inc. Plaintiff in turn filed a motion to allow interrogatories against Continental Supplies, Corp., Efraín Ortíz, and María Guzmán, and their conjugal partnership in order to produce information under said defendants' control needed to amend the complaint to add more predicate acts to the alleged RICO enterprise, and for a grant of 15 days after such evidence is produced to oppose the motion for dismissal and amend the complaint. Defendants have filed an opposition to plaintiff's motion to allow

additional discovery and to grant leave of time to oppose the motion to dismiss, and plaintiff has filed a reply to defendant's opposition. Defendants then filed a motion to strike plaintiff's reply, which has been opposed by plaintiff. We DENY defendants' motion to strike plaintiff's reply.

After considering the entire record in this case, including plaintiff's motion and the various oppositions and replies, we GRANT plaintiff's motion and WILL ALLOW plaintiff to pose interrogatories against Continental Supplies, Corp., Efraín Ortíz, and María Guzmán, and their conjugal partnership. We likewise GRANT plaintiff a period of 15 days after such discovery has been produced to oppose the motion for dismissal

filed by defendants Cuevas Cuevas, his spouse Guzmán and their conjugal relationship, Cuevas Ramos, his spouse Guzmán, and their conjugal relationship, and Family Restaurant, Inc. The motion to dismiss will be held in abeyance until such time as the discovery has been provided." See Appendix 4.

The district court did not lift the judgment by default against Miguel Elías Boneta and his wife Luisa Caborrovy and their conjugal partnership.

Respondents never appealed said order.

The first amended complaint was filed in November 12, 1991, in order to include all the names of the defendants' spouses, since they are indispensable parties according to the Puerto Rico conjugal partnership laws.

The second amended complaint was filed on April 15, 1992, in order to include

Family Restaurant, Corp., who handles the affairs in Puerto Rico for Bonanza, Corp., a non corporate entity in Puerto Rico, a U.S. mainland franchise, and also previous racketeering endeavors committed against Reynaldo Ramón, et al., were alleged against respondents. Consequently, petitioner propounded an interrogatory on August 17, 1992; that is, six (6) days after defendants' motion to dismiss was filed (August 11, 1992). See Appendix 5. After the order that granted leave for discovery from Honorable Judge Gilberto Gierbolini, the interrogatory had been sent to respondents since August 17, 1992, and petitioner had to request sanctions against respondent Continental Supplies, Corp., twice; one motion filed on March 10, 1993 and another on April 2, 1993. They finally answered said interrogatories with a delay of seven

months and sixteen days, on April 22, 1993. See Appendix 6.

After respondents answered the interrogatory, petitioner filed the opposition to the motion to dismiss and the amended complaint on May 10, 1993, within fifteen days, after the answering to the interrogatories, as specified by the court's order. See Appendix 7.

Although district court Judge Gilberto Gierbolini had granted the filing of the amended complaint in his order, supra, respondents never answered the third amended complaint nor did they indicated the need for discovery in the case at bar joining the case of Reynaldo Ramón et al. Instead, respondents filed a second motion to dismiss, more specifically against Reynaldo Ramón's case. These two second motions for dismissal never raised any issue concerning undue delay, demonstrating that respondents

acknowledged that the controversy of undue delay had been adjudicated by judge Gierbolini's order, and that petitioner's complaint was alive, notwithstanding the motion to dismiss Reynaldo Ramón's complaint.

As an example, respondent Héctor Cuevas Cuevas pleaded in his second motion to dismiss that:

> "Wherefore it is respectfully requested that the amended complaint filed in this case May 10, 1993 be dismissed as to plaintiffs Reynaldo Luis Ramón and his wife Iris Delia Rodríguez Rivera and their conjugal partnership...."

When petitioner appealed, respondents changed their theory and alleged undue delay and that the letters appearing from the amended complaint did not have any relationship with the fraud committed.

Petitioner cited all the cases related to these issues and demonstrated that the mail was used in relation to and in furtherance of the fraud.

The third amended complaint, titled plainly amended complaint, had been filed on May 10, 1993, with all the letters included, that is, eight (8) months and fourteen (14) days before the order denying its filing, on January 24, 1994. The ORDER granting the discovery and leave to amend had been entered on February 3, 1993, eleven months and twenty one days, before the order of January 24, 1994, reversing it and denying the filing of the third amended complaint.

This anomalous procedure occurred when Gierbolini became a senior judge and the case was assigned to Judge Juan Pérez Giménez, who reversed judge Gierbolini's order and denied the filing of the third

amended complaint. This order, dated January 24, 1994, reads as follows:

> "Denied. The amended complaint tendered on May 10, 1993, shall not be filed".

Along with the order denying the filing of the third amended complaint, a status conference was scheduled for Friday, February 11, 1994. None of the orders were notified to petitioner. For this reason petitioner could not attend the status conference.

On February 23, 1994, twelve days (12) after the status conference, the district court entered a judgment dismissing the second amended complaint, and thus, ignored the third amended complaint.

Since undue delay, if any, was disposed by Judge Gilberto Gierbolini, and no reason of undue delay was mentioned in the second motion for dismissal from

respondents against the joining case of Reynaldo Ramón et. als., nor in the order denying the third amended complaint or in the judgment that followed, petitioner did not address this issue of undue delay on his appeal to the court of appeals. Therefore this case was appealed under the assumption that the district court rejected a misjoining party with a dismissed case under Rule 41 (b) of Federal Civil Procedure, and therefore subject to have him dropped under Rule 21 of Federal Civil Procedure, according to a footnote on page 2 from the Appendix 4. Notwithstanding that past endeavors of racketeering activity against Reynaldo Ramón et al's case, dismissed under Rule 41 (b), could be utilized in order to demonstrate previous racketeering acts committed by respondents, in a different and distinct case, on which petitioner was not a party or in privy with said

plaintiffs.

Therefore, the conclusion of the court of appeals regarding undue delay from petitioner in moving to amend their complaint nine months after the filing of the summary judgment is not supported by the record.

It was not until the decision of the court of appeals, as to that petitioner committed undue delay, that the order of January 24, 1994 from the district court, denying the filing of the third amended complaint unfolded for petitioner as an error for lack of jurisdiction.

On appeal, plaintiff had alleged that the denial of the filing of the amended complaint was contrary to Rule 21 of Federal Civil Procedure. Nevertheless the court of appeals stated that:

> "the position taken by Tous on appeal that the denial of leave to file the third

amended complaint was based on Fed. R. Civ. P. 21 (misjoinder of parties) is not supported by the record". (See Appendix 1, at page 17, footnote 5.)

Thereby supporting petitioner's position as to that facts from the case dismissed under Rule 41 (b) could be utilized in order to demonstrate previous racketeering acts for petitioner's case.

The court of appeals did not take into account that according to the record two pre-trials had been cancelled by respondents. The first pre-trial was cancelled, according to respondents, because plaintiff had supposedly written a too long part and there was no time to have it typed, and the second because plaintiff supposedly did not transcript the part of one of the defendants according to his instructions;

nevertheless, said respondents never instructed the court as to what part was not duly transcribed, although one of the parties signed it. On October 8, 1991, petitioner sent a motion requesting sanctions for this second suspension. On appeal, the court of appeals determined that petitioner committed undue delay. Because of these new findings, petitioner had to appear under Rule 40 of Federal Appellate Procedure, with a petition for rehearing, within fourteen (14) days, in order to answer this new and unexpected finding, which was not supported by the record. On the contrary, what the record shows is that the alleged undue delay was caused by respondents.

The cases cited by the appellate court in support of their findings of undue delay, can be summarized in that petitioner delayed almost two years in order to amend his complaint, although

the amendment to the complaint was granted and said order was not appealed; that petitioner did not give any valid reason for his neglect and delay; that petitioner moved to amend his complaint nine months after the motion for dismissal was filed, which is not supported by the record; and that the interrogatory propounded to defendant Continental Supplies, Corp., was no new information to which petitioner had not had access previously, although the answers to the discovery were incorporated to the third amended complaint.

A. Whether the district court acted without jurisdiction and in conflict with Cohen v. Beneficial Industrial Loan, Corp., infra, by reversing a final order of a previous judge, which was not appealed, under the purview of 28 U.S.C. Sec. 1291, giving leave to

petitioner to make a discovery in order to oppose a motion to dismiss, and also allowing the filing of an amended complaint in order to comply with Rule 9 (b) of Federal Civil Procedure, when at the same time a judgment by default entered against respondents was lifted.

In Cohen v. Beneficial Industrial Loan, Corp., 337 U.S. 541 (1949), the U.S. Supreme Court established the elements to determine if an interlocutory order is final, in the absence of a congressional law. Said elements are as follows: "the decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration to be deferred until the whole case is adjudicated". supra, page 546.

"a decision final within the meaning of one district court does not necessarily mean the last order possible to be made". Gillespie v. United States Steel, Corp., 379 U.S. 148, 152 (1964). See also Mitchell v. Forsyth, 472 U.S. 511 (1985); Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 121 (1993).

The order granting a leave to conduct a discovery, along with amending the complaint was final under 28 U.S.C. Sec. 1291.

Therefore, the district court lacked jurisdiction to reverse that order, which by its nature and circumstances was final, and not appealed by respondents.

Rule 4 (1) of Federal Appellate Procedure states clearly that a notice of appeal shall be filed with the clerk of the court within thirty days of the entry of the judgment or order appealed from.

If movant fails to file the notice of appeals within the time period, the court of appeals looses all jurisdiction. Dahlen v. Kramer Machine. & Engineering Products. Co., 303 F.2d 293 (1961); Merrell-Nat. Labor., Inc. v. Zenith Labor., Inc., 579 F.2d 786 (3rd Cir. 1978).

Therefore, respondents failed to appeal said order and any controversy around undue delay was disposed by the order of the district court of January 3, 1993. Moreover, the denial of the filing of the third amended complaint was not triggered by undue delay, as it appears from a second motion to dismiss by respondents and the district court suggested reason, that Reynaldo Ramón had a judgment under Rule 41 (b) of Federal Civil Procedure, and therefore could not appear as plaintiff when past endeavors from his case could be very well alleged in the

case at bar.

The lifting of the judgment by default against defendants by the district court and the allowing of the discovery and leave to file an amended complaint, and thereafter denying the filing of said complaint by another district judge of the same category is not consistent with right and justice, and contrary to the Rules of Federal Civil Procedure.

> "An order must be consistent with principles of right and justice". In Re Ruffalo, 390 U.S 544, 555 (1968).

Therefore petitioner insists that the reasoning of the district court, based on the record was as to the effect that because the misjoining of a party (Reynaldo Ramón case), the third amended complaint was not allowed to be filed.

B. Whether the circuit court's reasoning as to undue delay constitute an

abuse of discretion and contradicts the Supreme Court's decision in Foman v. Davis, infra; when in the case at bar leave was granted to conduct a discovery and to file an amended complaint; and at the same time a judgment by default was lifted to respondents; the cases in the opinion do not relate with the case at bar and the finding of undue delay is not supported by the record.

The reason suggested by the district court to deny the filing of the third amended complaint, was the inclusion of a party with a case dismissed under Rule 41 (b) of Federal Civil Procedure, contrary to Rule 21 of Federal Civil Procedure. See Appendix 3, page 2, footnote 1.

The court of appeals accepted that the misjoinder of party was not the reason for the denial of the third amended complaint, when it stated that "the position taken by Tous on appeal that the

denial of leave to file the third amended complaint was based on Fed. R. Civ. P. 21 (misjoinder of parties) is not supported by the record". So, petitioner will not address any further this question of law.

Petitioner respectfully understands that Judge Gilberto Gierbolini's order demonstrates that the district court had decided the issue of undue delay before allowing petitioner to propound the interrogatory and to file the amended complaint, since at the same time a judgment by default was lifted for respondents.

Notwithstanding judge Gilberto Gierbolini's order allowing the filing of the third amended complaint, the circuit court, on appeal, and for the first time, determined sua sponte that petitioner committed undue delay.

The U.S. Supreme Court has consistently maintained that leave to amend shall be

freely given when justice so requires, in the absence of undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments, previously allowed, undue prejudice, to the opposing party by virtue of allowance of the amendment, etc. See Foman v. Davis, 371 U.S. 178, 182 (1962).

In Foman, supra, at pages 181-182, this honorable Court stated that "...outright refusal to grant the leave without any justifying reason appearing for the denial is not an [...] exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules".

The second motion to dismiss from respondents did not raise the issue of undue delay.

Because the issue of undue delay, if any, had been already determined in favor

of petitioner by the district court through Judge Gilberto Gierbolini's order, petitioner respectfully believes that the position taken by the appellate court confirming the district court's outright refusal to allow the third amended complaint, allowed by a previous judge, is erroneous, and also, an abuse of discretion contrary by the standards of equity and procedural fairness, as interpreted by this honorable Court.

The court of appeals, in going through this new issue of undue delay, cited cases that have no relationship whatsoever with the case at bar, as we shall see:

The court of appeals determined that petitioner took almost two years in order to amend the complaint, and was prompted to request discovery under the Rule 9 (b) of Federal Civil Procedure issue, by a motion of dismissal from defendants.

The court of appeals cited Quaker State Oil Refining v. Garrity Oil Co., 884 F.2d 1510, 1517 (1st Cir. 1989), in support of the finding that two years is a too long term to amend a complaint. Petitioner respectfully reply that the ratio of the court in that case went beyond the two years' period to amend the complaint, and found that even the fifth amended counterclaim "sounded meruit". All of the other elements present in that case are also distinguishable from the case at bar. There was a fifth complaint, not a third, and the circumstances that surrounded the decision are stated by the court as follows:

> "we believe the district court acted appropriately in this instance. We explain briefly. By that time, virtually all discovery had

been undertaken or at least noticed, supra., page 1517. The proposed counterclaim sounded in quantum meruit". Supra, page 1517. (Emphasis supplied).

Neither the district court or the circuit court went over the third amended complaint already presented for the record in order to determine its merits, which complied extensively with Rule 9 (b) of Federal Civil Procedure requisites, backed by a final ORDER that had granted petitioner's right to amend.

The other case cited by the court of appeals is Hayes v. New England Millwork, 602 F.2d 15 (1979), where the First Circuit found that:

"Furthermore, we cannot accept appellant's arguments that the appellee would suffer no prejudice from the

addition of the union as a defendant and the charge that the union breached its duty of fair representation. As the above passage quoted from the proposed amendment indicates, the complaint as amended would charge the company with conspiring with the union to deprive appellant of his right under the collective bargaining agreement, a charge not contemplated by the original complaint". Supra, page 20.

In other words, the pleading on the new complaint would change dramatically the original theory as pleaded by the plaintiff, after the discovery ended.

The "ratio" of this case also does not apply to the case at bar, because petitioner did not change his theory nor

any additional discovery was requested, since all of the respondents were under the same scheme and pattern of racketeering activity. The information requested was in possession of respondents, along with Continental Supplies, Corp. Although petitioner had all the letters used by respondent against Héctor Cuevas Cuevas, because of the dismissal under Rule 41(b) of Reynaldo Ramon's case, and in order to support the case of petitioner, letters used by respondents against petitioner José M. Tous et al., and in furtherance of the fraud with Continental Supplies, Corp., not brought in as defendant by Reynaldo Ramón, were necessary in order to comply with Rule 9(b) of Federal Civil Procedure. Said interrogatory submitted to Continental Supplies, Corp., and its answer was included for examination to the court of appeals.

The court of appeals also cited Freeman v. Continental Gin Company, 381 F.2d 459, 469 (5th Cir. 1967), that deals with a defendant that after three years of litigation, and after fourteen months of filing its original answer, on which no claim of fraud was alleged and more than eight months after a summary judgment was filed, moved to amend his answer and counterclaim to allege fraud. Moreover, the fifth circuit determined that:

> "the facts on which the claim of fraud is based were fully known to Freeman from the outset of the lawsuit and, indeed, were relied on by him, though under a difference theory, in his original answer. It was not until that theory was rejected by the trial court-

correctly as we have held above-that the amendment was tendered seeking to make out a showing of fraud from those facts". supra, page 469. (Emphasis supplied)

Again, the case cited by the court of appeals is at the extreme from petitioner's case, and nevertheless the amended complaint was considered in order to dispose of the case.

Mere delay is not a consideration to deny an amendment. Hayes v. New England Millwork, supra at page 19.

Another case cited by the court of appeals, Stepanischen v. Merchants Dispatch Transp., Corp., 722 F.2d 922, 933 (1st. Cir. 1983), does not maintain relationship with the facts of the case at bar. In that case plaintiff decided to amend his complaint to add a count for breach of contract and to provide an

additional reason for his bad faith termination, and the district court denied the amendment.

> "Despite Stepanischen's claim to the contrary, the addition of new claims would likely have required additional discovery and caused further delay". See supra, at page 933.

Again, in the case at bar, the court of appeals stated some facts unsupported by the record against petitioner, in that:

> "Further the motion to amend was not filed until May 1993--almost nine months after the motion to dismiss was filed and over two years since Tous initiated the action". See Appendix 1, page 21.

Contrary to the appellate court's finding, a motion to dismiss under Rule 9

(b) of Federal Civil Procedure was filed on August 11, 1992, after a judgment by default was entered on June 3, 1992, and in August 17, 1992, six days afterwards, petitioner moved to present a motion to file an interrogatory, in order to obtain information in relation with the use of U.S. mail, in furtherance of the fraud, maintained under the control of Continental Supplies, Corp., and it was granted.

The court of appeals cited Andrews v. Bechtel, 780 F.2d 124 (1st Cir. 1985), in order to sustain that a late motion for summary judgment or dismissal may not in itself justify an excessive delay in moving to amend. In said case the plaintiff moved to state a claim nine years after the initial complaint was filed, and a year and a half after the motion for summary judgment was made and two days into trial. Furthermore, a claim

similar to the intended amended complaint had been dismissed previously. "Regardless of the similarity of the new claim to one already being tried..." supra, at page 139 (Emphasis supplied).

Petitioner respectfully thinks that those facts do not have any relationship with petitioner's case.

Moreover, in the case at bar the appellate court did not consider defendants' delaying actions, within the time span of almost two years, where they cancelled two pre-trials, and later on, the fact that the court entered a judgment by default against them which was lifted afterwards in the same order where the district court judge allowed the discovery and the amended complaint to be filed by petitioner; See Farkas v. Texas Instruments, Inc., 429 F.2d 849, 851 (1970).

Petitioner also contends that -in

equity- the same opportunity granted to respondents, where the court lifted the judgment by default, should have been given to petitioner into filing the amended complaint already presented for the record, once the discovery and the filing of the amended complaint was authorized under the doctrine of New England Data Services, Inc. v. Becher, 829 F.2d 286 (1st Cir. 1987), with all corresponding information regarding the letters, complying with Rule 9(b) of Federal Civil Procedure.

The court of appeals also determined that the record does not show that the data received by petitioner through the interrogatory could not have been discovered earlier, when said controversy had been disposed by the district court judge, and the interrogatory was conducted in order to look for information in possession of defendants,

like letters, content, dates, to whom were sent and who sent them.

The court of appeals cited the case First National Bank of Louisville v. Master Auto Serv., Corp., 693 F.2d 308 (4th Cir. 1982), with no relationship whatsoever with the case at bar. Said case dealt with futility of an amendment in order to allege facts already disposed of in a bankruptcy court proceedings, unduly delayed because plaintiff wanted to amend his complaint nineteen days before trial, and wanted to open discovery in order to allege a "sale out of the ordinary course of business with respect to the $247,000.00 transaction". And after holding a hearing, the court held that "the Bank had not obtained any information that it previously had not known of or had access to". Supra, at page 314. Petitioner believed that in order to allow a "sale out of the

ordinary cause of business", discovery was totally academic. (Emphasis supplied).

In the case at bar petitioner had some receipts from Continental Supplies, Corp., delivered in Puerto Rico to respondents Héctor Cuevas et al., but those receipts were not used as part of the U.S. mail, in furtherance of the fraud in order to import the kitchen appliances to the island. The answer to the interrogatory was crucial in order to comply with Rule 9(b) of Federal Civil Procedure; use of the U.S. mail in furtherance of the fraud.

In Island Creek Coal, Co., v. Lake Shore, Inc., 832 F.2d 274 (4th Cir. 1987), the court decided that it was an abuse of discretion when a complaint was amended with three and a half (3 1/2) years of delay, when the amendment is sought with reasonable promptness after

new facts are known and no prejudice is demonstrated.

Addressing this point of undue delay and following Foman v. Davis, supra, the 9th. Circuit has delivered a more clear explanation as to when and how to determine undue delay. The appellate court maintained that when there is a discovery ongoing, no trial scheduled, no pre trial scheduled, and no evidence as to that the defendants could be prejudiced, amendments to pleadings are to be liberally granted, where from the underlying facts or circumstances, plaintiff may be able to state a claim. D.C.D. Programs, Ltd. v. Leighton, 833 F.2d 183, 188 (9th Cir. 1987). Plaintiff in that case wanted to join a new defendant.

> "Thus, while H.F.B.'s claim, and the district court decision that the third

> amended complaint did not state a claim under section 10(b) may be valid, appellants should be granted leave to amount "unless it appears beyond doubt", that appellants fourth amended complaint would also be dismissed for failure to state a claim since appellants threefold could "prove no set of facts in support of [their] claim[s] which would entitle [them] to relief". Supra, page 188.

In the case at bar, no pre-trial was scheduled, no trial was scheduled, no change of theory in the amended complaint, a leave for discovery and to amend the complaint had been granted and the main reason to amend the complaint was to include the letters used by

defendants, upon their request through the motion to dismiss, in order to comply with Rule 9(b) of Federal Civil Procedure.

The court of appeals never addressed the controversy, but petitioner joined a defendant, not indispensable in the present case, and respondents did not oppose to it in their second motion to dismiss, and it was not the cause to deny the filing of the third amended complaint. Nevertheless petitioner requested the court of appeals to have him dropped, in accordance with Newman-Green, Inc. v. Alfonzo Larrain, 492 U.S. 932 (1989).

EXISTENCE OF JURISDICTION BELOW

Petitioner appealed this case under the doctrine of abuse of discretion, when according to the judgment an amended complaint was denied because a misjoinder of party, which is contrary to rule 21 of

Federal Civil Procedure.

Undue delay was never a controversy to petitioner, since it was never raised by respondents in their second motion to dismiss against the case of Reynaldo Ramón, a not indispensable party misjoined in the present action. It was not until the appellate court determined that the reason to deny the filing of the amended complaint was undue delay, that petitioner had to appear before the court with a petition for rehearing, within fourteen days, in order to demonstrate that under that "ratio", the order entered by the court allowing the discovery and the filing of the amended complaint, was reversed without any cogent reason.

For example, the district court vacated a so called judgment entered erroneously on the magistrate report and recommendation lifting the judgment by

default against respondents.

But in the situation of undue delay, the order entered by the district court, disposing the controversy by Judge Gilberto Gierbolini was final and the district court acted without jurisdiction in reversing it afterwards.

Even orders granting leave to amend, and reconsidered on time within ten days by movant "may be reconsidered and reversed by the district judge only if clearly erroneous or contrary to law, 28 U.S.C. 636 (b)(1)(A) (1982)". See Quaker State Oil v. Garrity Oil Co., supra, at page 1567. The order from Judge Gierbolini did not lack specific findings and did outline its reasoning. Webb v. Califano, 468 F. Supp. 825, 829 (E.D. Cal., 1979). Nor the order from Judge Gilberto Gierbolini was cryptic and offered hints as to the reasons for believing the amendment to be justified. Spiegel v.

Trustees of Tufts College, 843 F.2d 38, 43-44 (1st Cir. 1988).

REASONS FOR THE ALLOWANCE OF THE WRIT

The reasons for granting the writ go beyond the particular interests of the petitioner.

By the erroneous application of the federal procedural rules, as it has been described, the courts of record have gone against the spirit of the procedural rules, and have decided important questions of federal procedural law in a way that conflicts with the decisions of this Supreme Court. (Rule 10.1(a)(c) of the Supreme Court Rules).

The predominant reason to grant the writ of certiorari is that the case involves important issues of federal civil procedure, which is considered the area of prime responsibility for exercising the power of supervision by the Supreme Court, for the proper functioning of the

federal court's procedural system. See R. Stern, E. Gressman and S. Shapiro, Supreme Court Practice, 6th. ed., B.N.A., 1986, Sec. 4.15, p. 220.

The court of appeals has rendered a decision in conflict with the decisions of this Court, not following Foman v. Davis, supra, and Cohen v. Beneficial Industrial Loan, Corp., supra.

Moreover, along with the alleged conflicts with decisions of the U.S. Supreme Court, the order denying the filing of the amended complaint by its circumstances is not viable in equity. The U.S. Supreme Court has rendered the criteria of what an order should be, as to the extend that "An order must be consistent with principles of right and justice". In Re Ruffalo, supra.

The decision made by the court of appeals is in conflict with applicable decisions by the U.S. Supreme Court. The

precedents as to what is a final order has been very well established by the U.S. Supreme Court since the Cohen case, supra. The district court acted without jurisdiction in reversing an order that was final as to the rights that it granted to petitioner. Said conduct was allowed by the court of appeals when it decided that petitioner incurred in undue delay when they submitted an amended complaint, previously allowed by a final order from another district court judge. In the "ratio" for not considering the filing of the third amended complaint, the court of appeals misinterpreted and misapplied the doctrine of undue delay and the cases therein cited.

For some unknown reason the cases of other courts of appeals cited by the First Circuit Court of Appeals, in support of the decision, are contrary or totally distinguishable to the case at

bar, when applied in accordance with the record.

Delay cannot be delay by itself; other elements should be taken into account, like for example, if a trial is scheduled, if a pre-trial is scheduled, if there is a need for discovery, or the theory in the case was changed, or if the delay can be attributable to the other party, as in this case.

The Supreme Court must intervene when lower courts render a decision in direct conflict with precedents and principles well stablished by this Court or the circuit courts.

Conclusion:

As petitioner pointed out, the district court under the doctrine of a final order and undue delay, as expressed by the court of appeals, acted without jurisdiction in reversing an order that by its own nature was final, and contrary

to the principles of equity. Even respondents on their second motion to dismiss the case of Reynaldo Ramón, did not raise the issue of undue delay.

Respondents' first motion to dismiss was filed with a judgment by default already entered against them.

If any undue delay was committed it was voluntarily waived by respondents for their lack of action within the term of thirty days in order to appeal the final order allowing a discovery and the filing of an amended complaint at the same time that the judgment by default was lifted.

Nevertheless, petitioner insists that the order from Judge Gierbolini was according to law and no undue delay was committed by petitioner under the doctrine cited and the undisputed facts of the present case.

Petition:

Wherefore, petitioner requests of this

Court to grant the writ of certiorari and reverse the decision of the First Circuit Court of Appeals that affirmed the dismissal of this action and to remand for further proceedings.

Certificate of service: I, José M. Tous, sent a photocopy of this petition for certiorari to each counsel: Mr. Rafael F. Castro Lang, Esq, P.O Box 3222, San Juan, P.R. 00902-3222, Mr. Augusto A. Cirino Gerena, Esq. Apartado 2042, Hato Rey, P.R. 00919

Respectfully submitted on January 7, 1995.

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USDC #129007

(NOT FOR PUBLICATION)

UNITED sTATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 94-1377

JOSE M. TOUS, INC. ET AL.

Plaintiff Appellants

v.

CONTINENTAL SUPPLIES, INC., ET AL.

Defendants, Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

(Hon. Juan M. Perez-Gimenez, U.S. District Judge)

Before

Torruella, Chief Judge

Cyr and Boudin, Circuit Judges

José M. Tous-Rdríguez on brief pro se,

Augusto A. Cirino Gerena on brief for appellees Continental Supplies, Inc.,

Efraín Ortíz, and his wife María Guzmán and their conjugal partbnership.

P. Castro Amy, Rafael Castro Lang, and A;fonso Rivera Valdivieso on brief for appellees Cuevas and Family Restaurant, Inc.

September 6, 1994

Per Curiam. Appellants, José M. Tous, Inc., and José M. Tous (referred as Tous) appeal from the judgement of the Puerto Rico district court dismissing the second amendment complaint filed by Tous for failure to comply with Fed. R. Civ. p. 9 (9). Tous and Hermanos Ramón, Inc., Reynaldo Luis Ramón, Iris Delia Rodríguez Rivera (Ramon's spouse and their conjugal partnership referred to as Ramón) also appeal from the denial of the motion to file a third aemnded complaint and to add the Ramón parties as plaintiffs to that complaint. Both pleadings allege violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 et seq. ("RICO"). Named as defendants in the second and third amended complaints are (1) Continental Supplies, Corp.; (2) Efraín Ortíz, his wife and therir conjugal partnership; (3) Héctor Cuevas Cuevas, his wife and their

their conjugal patnership; (4) Héctor Cuevas Ramos, his wife and their conjugal partnership; and (6) Family Restaurants.

I. APPELLATE JURISDCITION

Before addressing the merits of the appeal, we must dispose of the two jurisdictional isues. The first, raised by Family Restaurant, Cuevas Cuevas and Cuevas Ramos, concerns Fed, R, App. p. 3 (c). Appellees point out that the notice of appeal refers only to the judgment dismissing the second amended complaint, Rule 3 (c) requires that "(a) notce of appeal must...deignate the judgment order, or part thereof from..." By failing to specifically refer to the order denying the motion to add the Ramón parties as plaintiffs, appellees argue, this court cannot review the order.

Appellees are mistaken. The general rule is that one to which appellees refer, are subject to appeal once the

district court enters a final judgment. See Mangual v. Gen Battery Corp., 710 F.2d. 15, 17 n.2 (1st. Cir. 1993) (interlocutory order dismissing complaint as to some but not all defendants appealable when final judgment entered); James W. Moore, Bernard J. Ward 7 to Desha Lucas. Moore, Federal Practice @110.08 (1), at 47-54 (2d ed. 1994((interlocutory order that leave the cause of action pending are "reviewable on appeal from final judgment"). Thus we have jurisdiction to review the order denying the motion to file the third amended complaint and the request to add parties.[1]

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[1]. This renders mooot appellees' further contention that the appeal should be dismissed because Ramón appellants were not parties to the second amended complaint and, therefore, had no right to complain about the

Also unavailing is appellees' argument that the Ramón parties cannot be appellants because the notice of appeal is defective. First, they argue, it does not specifically refer to them as "appellants" and, second, the body of the notice only states that "plaintiff above-named" is appealing. Under Rule 3(c), a notice of appeal is effective if it names each appellant in the caption of the notice of appeal. The Ramón parties are, in fact listed in the caption. The Fact that the caption refers to them as "plaintiff" does not invalidate the propriety of the nottice. "An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. "Fed. R. App. P. 3 (c). This is

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judgment dismissing it.

such a case.

The second issue we raise sua sponte. In their answer to the complaint, Continental Supplies and Ortiz asserted a counter claim for abuse of the legal process by Tous and for attorney's fees. They also cross-claimed against Cuevas Cuevas and Cuevas Ramos for recompense should Tous prevail. The district court never disposed of these claims. Under Fed. R. Civ. P. 54(b), an order "which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties. . . ." Such an order is not generally appealable. See Rule 54(b) (requiring certification of such interlocutory orders for purpose of appeal).

There are exceptions to this rule, however, which we believe control this

appeal. First, an order which "necessarilly resolve[s] "an outstanding counterclaim or cross-claim is final despite the lack of reference to the claim in the final judgment. See Boston Car Co. v. Acura Auto Div., 971 F.2d. 811, 814 (1st. Cir. 1992). Here the cross-claim for recompense was resolved when the complaint was dismissed. That is, once appellants lost, this claim became moot.

The counterclaim, however, was not decided by the dismissal of the action and still is pending. Nonetheless, the nature of this claim does not preclude a determination that the judgment appealed from is final. Under Budinich v. Becton Dikinson & Co., 486 U.S. 196 (1988), the Supreme Court held that an outstanding request or motion for attorney's fees does not prevent finality because "its resolution will not alter the order [on

the merits] or moot or revise decisions embodied in the order." See id. at 199-200.

As for the claim for abuse of the legal process, appellees do not press it on appeal. In any event, it necessarilly arise until the action was concluded and the appellants had lost. Cf. In re Sweet Transfer & Storage, Inc., 896 F.2d. 1189, 1191 (9th. Cir. 1990) (an order dismissing an involuntary bankruptcy petition is final and appealable despite pending counterclaim by debtor for damages for bad faith in filing the petition; "[a]ny actual claim brought for damages is premature prior to dismissal of the petition"). Finally, the resolution of the abuse of process claim does not affect the merits of the final judgment. See Budinich 486 U.S. at 199. We therefor have jurisdiction over this appeal.

II. THE MERITS

A. The Motion to Amend.

A decision of the district court denying leave to amend under Fe. R. Civ. P. 15 (a) is reviewed for abuse of discretion.[2] See Colmenares Vivas v. Sun Alliance Ins. Co., 807 F.2d at 1108 (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). Because there were essentially two separate requests in the motion under review, we will address them separately.

1. Motion to add the Ramon parties

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[2]. Appellants mistakenly refer to Rule 15 (d) in their brief. This rule, by its language, only applies to supplemental pleadings which contain averments of "events which have happened since the date of the pleading sought to be supplemented." (emphasis added). The new averments in the third amended complaint refers to events which ocurred prior to the filing of the complaint.

as new plaintiffs. In 1991, Ramón had filed a separate RICO action in the district court. However, it was dismissed in 1992 for failure to comply with Fed. R. Civ. P. 9(b). The court held that the complaint did not identify any letters, or their senders, dates, contents. In support of the request to add the Ramón parties as plaintiffs in the Tous action, appellants point out that the order dismissing the Ramón complaint did not state whether it was or with out prejudice. From this, they argue that the dismissal must be construed as having been without prejudice to amend the complaint's facial deficiencies. As result, they conclude that the district erred in applying the doctrine of res judicata to bar the addition of the Ramón parties to the Tous action.

We begin with Fed, R. Civ. P. 41 (b).

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissaal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, opperates as an adjudication upon the merits".

A dismissal under Rule 41 (b) for a

plaintiff's failure to comply with the rules, unless the court otherwise provides, is with prejudice and on the merits. See LeBeau v. Taco Bell, Inc. 892 F2d. 605, 607 (7th. Cir. 1989) (dismissal for want of prosecution was on the merits and "with prejudice" whre judgment did not "otherwise state") Nagle v. Lee, 807 F2d. 435, 442-443 (5th. Cir. 1987) (where judgment did not state whether it was without prejudice, Rule 41 (b) requires court to treat dismissal as being with prejudice and on the merits).

In Ramon's case the dismissal was for failure to comply with one of the Rules of Civil Procedure and not, as appellants argue, for lack of jurisdiction. Dismissal for violations of other rules in similar situations have been treated as being with prejudice and on the merits. See In re Reed, 861 F 2d. 1381, 1382 (5th Xir. 1988) (dismissal

under Fed, R. Civ. P. 37 (b) (2) (C) for failure to comply with discovery orders was with prejudice and, therefore, on the merits); Nevijel v. North Coast Life Ins. Co., 651 F 2d. 671, 673 (9th Cir. 1981) (complaint which falls to comply with Fed. R. Civ. P. (a) and (e) may be dismissed with prejudice under Rule 41 (b).

In this situation, Rule 41 (b) puts the burden on the plaintiff to take action-- to persuade the district court either to specify that a dismissal is without prejudice, or to vacate the dismissal. Failing that, plaintiff's recourse is to appeal". LeBeau, 892 F2d. at 608; see also In re Reed, 861 F2d. at 1383 (if a dismissal is inequitable, recourse is to appeal or file a motion under Fed, R. Civ. P. 60 (b); 1B James W. Moore, Jo Desha Lucas & Thomas S. Courier, Moore's Federal Practice [Sec.] 0.409 {1.2], at

III-137, III-139 (2d. ed. 1993) (plaintiff cannot ignore court's dismissal for failure to comply with Rules and just file a new action; plaintiff must take a timely motion to amend the judgment to state that it is withour prejudice).

As for the failure of the Ramón parties to file a motion to amend their complaint or a Fed. R. Civ. P. 60 motion for clarification concerning whether the judgment, in fact, was with or without prejudice, appellants asserts that they chose not to act for ecocnomic and time saving reasons". That is, because both complaints concerned the same pattern of racketeering by defendants, the two cases they believed, should be filed jointly. This is not a valid excuse. Similarly unaveiling their assertion that the letters upon which Ramón's RICO claim was based were not found until <u>after</u> the

dismissal of the complaint. This stament is conclusory in nature and is not accompanied by supporting documents of affidavits.

Based on the foregoing, we conclude that the judgment dismissign the Ramón complaint was with prejudice and on he merits. Under federal law, which governs federal actions, res judicata bars a second action if (1) there was a final judgment on the merits in the earlier action, (2) there exists sufficient identity between the causes of action asserted in each suit, and (3) there is sufficient identity between the parties in the two actions. Gonzalez v. Banco Central Corp., No. 93-2021, slip op. at 6 (1sr Cir. June 30, 1994).[3]

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[3]. Appellants attempt to argue that collateral estoppel rather that res judicata applies to their casae. They cite Guzowsky v. Hartman, 969 Fd. 211

Plainly, the first requirement has been met as discussed, supra. Second, a comparison between the complaint in the case at hand reveals that the RICO claim in both suits are identical. Indeed, appellants do not dispute this. Finally, the parties to the two actions also are identical. That is, the plaintiffs in bot actions are Reynaldo Ramón, his wife, their conjugal partnership and Hermanos Ramón, Inc., and the defendants they are suing are Family Restaurant, Cuevas Cuevas, Cuevas Ramos, Elías Boneta and José Nazario (and their spouses and

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(6th Cir. 1992), cert. denied, 113 S. Ct. 978 (1933), in support of the contention. In Guzowsky, however the order dismissing the first complaint was without prejudice. Guzowsky, therefore, is not applicable to this case.

conjugal partnership).[4]

We therefore conclude that the Ramón parties were barred from relitigating their RICO claim. As a result, permitting them to join as palintiffs in the third amended complaint ultimately would have let to their dismissal. "Where an amendment would be futile or would serve no legitimate purpose, the district court

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[4]. The third amended complaint also lists as defendants Contiental Supplies and Ortíz. Although they were not defendants in the Ramón case, a reading of the third amended complaint reveals that the Ramón plaintiffs are not asserting a claim against them. See third amended complaint, [Secs.} 48-68 (only referring to Fidelity National Leasing, Inc. Banco Nacional and Family Restaurant as RICO "enterprises whose affairs were conducted through a pattern of racketeering activity).

should not neddlessly prolong matters". Correa-Martínez v. Arrillaga-Beléndez, 903 F2d. 49, 59 (1st Cir. 1990). In such situation, the denial of leave to an amend is not an abuse of discretion. See id.

2. Motion to file the third amende complaint. In certain circumstances, undue delay in filling a motion to amend can provide basis for the denial of a proposed amendment.[5] See Quaker State Oil Refining Corp. v. Garrity Oil, Co., 884 F2d. 1510, 1517 (1st. Cir. 1989) (two-year period elapsed between filing of counterclaim and motion to add a fifth); Hayes v. New England Mill work Distributors, Inc., 602 f2d. 15, 19 (1st.

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[5]. The position taken by Tous on appeal that the denial of leave to file the third amende complaint was based on Fed. R. Civ. P. 21 (misjoinder of parties) is not supported by the record.

Cir. 1979) (two years between filing of complaint and motion to amend). In such caes, "courst have placed the burden upon the movant to show some 'valid reason for his neglect and delay.'" Hayess, 602 F2d. at 19-20 (citing Freeman v. Continental Supplies Gin Co., 381 F2d. 459, 469 (5th Cir. 1967); see also Stepanischen v. Merchants Dispatch Trans., corp., 722 F2d. 922, 933 (1st. Cir. 1983).

Here, Tous does not provide any reasons for his delay in requesting leave to file the third amended complaint. Indeed, it was not until some of the appellees files a motion to dismiss in August 1992-- almost two years after the filing of the initial complaint-- that Tous was prompted to request discovery on the Rule 9(b) issue. Further, the motion to amend was not filed until May 1993-- almost nine months after the motion to dismiss

was filed and over two years since Tous initiated the action. "We have held ... that a late motion for summary judgment or dismissal may not in itself justify an excessive delay in moving to amend." Andrews v. Bechtel Power Corp., 780 F.2d 124, 139 (1st Cir. 1985), cert. denied, 476 U.S. 1172 (1986). Finally, although Tous proposed an interrogatory to Continental and Ortiz, there is no indication that the data he received from them, if any, could not have been discovered earlier. See First National Bank of Louisville v. Master Auto Serv., Corp., 693 F.2d 308, 314 (4th Cir. 1982) (district court's denial of motion to amend upheld where movant's amended claim was not premised on new information to which it previously had not access). We therefore find that the district court did not abuse its discretion in denying the motion to amend.

B. Dismissal of the Second Amended Complaint.

As the district court held, Rule 9(b) requires that a RICO plaintiff "must go beyond a showing of fraud and state the time, place and content of the alleged mail and wire communications perpetrating that fraud." New England Data Services, Inc. v. Becher, 829 F.2d 286, 291 (1st Cir. 1987). On appeal Tous only argues that the third amended complaint satisfies this standard; indeed, Tous concedes that the second amended complaint is defective under Becher. Thus, for essentially the reasons stated in the district court's Opinion and Order, dated February 23, 1994, we agree with its decision that the second amended complaint did not comply with Rule 9(b).

III. CONCLUSION

The judgment of the district court is affirmed.

(NOT FOR PUBLICATION)

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 94-1377

JOSE M. TOUS, INC., ET AL.

Plaintiff Appellants

v.

CONTINENTAL SUPPLIES, INC., ET AL.

Defendants, Appellees

Before

Torruella, Chief Judge,

Cyr and Boudin, Circuit Judges

ORDER OF COURT

Entered October 20, 1994

The motion for rehearing is denied.

By the Court:

Francis P. Scigliano

[cc: TOUS AND CIRINO GERENA]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

JOSE M. TOUS INC. ET ALS.
Plaintiff

v.

CONTINENTAL SUPPLIES, INC. ET. ALS.
Defendant

Civ. NO. 90-2625(GG)

J U D G M E N T

The court having entered an order on this same date granting defendants' Motion to Dismiss, dated August 11, 1993, it is hereby

ORDERED AND ADJUDGED that judgment dismissing the instant case is hereby granted.

San Juan, Puerto Rico, February 23, 1994.

JUAN M. PEREZ GIMENEZ

U.S. District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

JOSE M. TOUS INC. ET ALS.
Plaintiff

v.

CONTINENTAL SUPPLIES,INC. ET. ALS.
Defendant

Civ. NO. 90-2625(GG)

OPINION AND ORDER

The Court has before it defendant's Motion to Dismiss dated August 11, 1992, which was opposed by plaintiffs on May 10, 1993.

I- Background

On December 10, 1990, José M. Tous, Inc., and José M. Tous Rodríguez filed a complaint against defendants alleging violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.,S.C. [Sec.] 1961, et. seq. The complaint was amended on April 12, 1992, in order to add as an additional defendant Family Restaurants, Inc. On May

1, 1993, plaintiffs filed a third amended complaint adding new plaintiffs and causes of action that had been dismissed in Civil Case No. 91-2322 (JP) before this Court. By order dated January 24, 1994, this Court disallowed the filing of the amended complaint.[6] On February 11, 1994, a status conference was held, which was attended by defendant's attorneys. Plaintiffs failed to appear.

Since the filing of the complaint plaintiffs have conducted discovery.

The second amended complaint alleges that defendants devised and participated in an unlawful scheme and conspiracy to commit mail fraud in violation of 18 U.S.C. [Sec.] 1341. Defendants have

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[6]. Plaintiffs are barred by principles of res judicata from asserting the previously dismissed causes of action alleged in Civil Case No. 91-2322 (JP).

filed a motion to dismiss the complaint arguing that the complaint fails to meet the specifity requirements of Federal Rule of Civil Procedure 9(b) and that the complaint fails to state a claim upon which relief can be granted since it does not specify time, place, contents of alleged mail fraud and identity of persons making representation as required by law.

II - Discussion

RICO provides a private cause of action for "[a]ny person injured in his business or property by reason of a violation of (18 U.S.C.) Sec. 1962." 18 U.S.C. Sec. 1964(c). In this case, plaintiffs asserts violations of 18 U.S.C. Sec. 1962(c) and (d).[7] To

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[7]. 18 U.S.C. Sec. 1962(c) and (d) provides:

(c) It shall be unlawful for any person employed by or associated with any

stablish a violation under section 1962, plaintiffs must stablish a "pattern of racketeering activity" under 18 U.S.C. Sec. 1961(1)(B) and (5). To make this showing, plaintiffs must prove that defendants engaged in two "predicate acts" of mail fraud, under 18 U.S.C. Sec. 1341, or wire fraud, under 18 U.S.C. 1343, in the course of the alleged

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enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through apattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions os subsection (a), (b), or (c) of this section.

conspiracy. In this case, in regard to pleading mail fraud, plaintiffs complaint states only that defendants "in furtherance of their unlawful conspiracy, on more than two occasions have used the United States mail and other instrumentalities of interstate commerce in violations (sic) of the statutory prohibition against mail fraud, 18 U.S.C. 1341. . . ." (See paragraph 22 of the Second Amended Complaint).

The second amended complaint does not identify the alleged letters, their dates, senders, or contents. Defendants have consequently moved to dismiss plaintiffs' RICO caused of action on the ground that it fails to allege with particularity the RICO predicate acts and therefore does not satisfy the requirements of Rule 9(b) of the Federal Rules of Civil Procedure, which provides that "[i]n all averments of fraud or

mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

In New England Data Services, Inc. v. Becher, 829 F.2d 286 (1st Cir. 1987), after finding that the requirements of Rule ((b) apply in the pleading of RICO mail and wire fraud the First Circuit held that RICO plaintiffs do not meet the requirements of the rule where they "have merely stated conclusory allegations of mail and wire fraud, with no description of any time, place or content of the communication." Id. at 292. [8] Since

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[8]. The New England Data services court explained that the purposes behind Rule 9(b) include "avoiding groundless claims and strike suits, the potential damage to a defendant's reputation, especially if the underlying RICO claim is based on criminal activities, and ensuring that defendants have been

plaintiffs in this case have gone no further than stating conclusory allegations, the court finds that their complaint fails to meet the particularity requirement of Rule 9(b).[9]

In this case plaintiffs have had ample opportunity to conduct discovery so that

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adequately put on notice to enable them to give meaningful responses." 829 F.2d at 292.

[9]. Plaintiffs' deficient allegations as to mail fraud are very similar to the allegations found deficient in New England Data Services, in which plaintiffs' complaint stated: "[I] in furtherance of the[ir] fraudulent scheme, defendants on two or more occasions used the mails and/or transmitted communications by wire in interstate and foreign commerce. . . ." 829 F.2d. at 288.

they may allege the mail fraud acts with the specifity required by Rule 9(b) of the Federal Rules of Civil Procedure and the First Circuit opinion in New England Data Services, Inc., supra. They have failed to do so. Their opposition does not address this issue even though the court allowed them to conduct discovery as to this particular matter.

In addition, in H.J., Inc. v. Northwestern Bell Tel. Co., 109 S.CT. 2893, 2900 (1988), the Supreme Court held that the plaintiff must demonstrate that the predicate acts are related and that they amount to or pose a threat of continue criminal activity, No such factual demonstration nor allegation is found in plaintiffs' second amended complaint.

Under these circumstances granting of dismissal is appropriate. Judgment shall be entered dismissing the complaint.

IT IS SO ORDERED.

San Juan, Puerto Rico, February 23, 1994

Juan M. Perez-Gimenez

U.S. District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

JOSE M. TOUS INC. ET AL.
Plaintiffs

v.

CONTINENTAL SUPPLIES, INC. ET. AL.
Defendants

CIVIL. NO. 90-2625(GG)

ORDER

The clerk's office entered default against all defendants on June 11, 1992 for their failure to answer plaintiff's second emended complaint. On June 15, 1992, defendants Continental Supplies, Inc., Efraín Ortíz, María Guzmán and their conjugal partnership, requested relieve from the entry of default against them and tendered their answer to the second amended complaint. Defendants Héctor Cuevas Cuevas, Margarita Guzmán, and their conjugal partnership, Cuevas Ramos, Annette Román, and their conjugal partnership, and Family Restaurant, Inc.,

also moved to set aside the entry of default on June 25, 1992. They also tendered their answer to the second amended complaint.

Plaintiff filed an opposition to the request for setting aside the default on June 19, 1992. Defendants Continental Supplies, Efraín Ortíz, María Guzmán, and their conjugal partnership filed a response to plaintiff's opposition, and plaintiff in turn filed a reply to their response and a sworn statement.

We referred the above to the magistrate for a report and recommendation since we found that "the allegations contained in the various afore-mentioned motions involve fact-specific inquiries as to whether or not plaintiff failed to comply with the magistrate's previous orders concerning the Reynaldo Ramón deposition and other discovery matters, and whether or not notification was actually given to

defendants of plaintiff's request that default be entered." The magistrate issued a report and recommendation on October 1, 1992, in which he recommended that we vacate all entries of default.

The parties were notified of the magistrate's report on October 5, 1992 by mail. The report specifically stated that parties would have ten (10) days to file any objection to said report, and that "Failure to comply with this rule precludes farther appellate review. "See Thomas v. Arn, 474 U.S. 140, 147-148 (1985); and United States v. Valencia, 792 F.2d 4, 6 (1st Cir. 1986)." No objections to such report have been filed within the ten-day period prescribe under the Local Rules of this court, Local Rule 510.2.

We are not obligated, consequently, to make a de novo determination, since 28 U.S.C. [Sec.] 636 (b) (1) (C) requires

only that a district court judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. [Sec.] 636 (b) (1) (C) (Supp. 1992) (emphasis added). No review is therefore required of any issue not the subject of a proper objection. Thomas v. Arn, 474 U.S. at 147-148; and Valencia, 792 F.2d at 6.

Wherefore, in view of the above, the magistrate's Report and Recommendation of October 1, 1992 is hereby approved and adopted as our own pursuant to 28 U.S.C. [Sec.] 636(b)(1)(C), with one small exception. Although the magistrate recommended that we vacate all entries of default, it appears from the case-file and from the magistrate's own report that defendants Miguel Elías Boneta-Boneta, his wife Luisa Caborrovy and the conjugal

partnership between them, have failed to file a motion requesting that we set aside the default entered against them. We thus decline to sua sponte vacate the default entered against defendants Boneta, Coborrovy and their conjugal partnership.

The motions to vacate the entry of default against them, filed by defendants Continental Supplies, Inc., Efraín Ortíz, María Guzmán and their conjugal partnership, Héctor Cuevas Cuevas, Margarita Guzmán and their conjugal partnership, Héctor Cuevas Ramos, Annette Román and their conjugal partnership, and Family Restaurant , Inc., are hereby GRANTED and the default entered against these defendants by the clerk's office on June 11, 1992 is hereby VACATED AND SET ASIDE".

Also pending before us is an August 11,1992 motion to dismiss the second

amended complaint filed by defendants, Cuevas Cuevas, his spouse Guzmán, and their conjugal partnership, Cuevas Ramos, his spouse Román, and their conjugal partnership, and Family Restaurant, Inc. Plaintiff in turn filed a motion to allow interrogatories against Continental Supplies, Corp., Efraín Ortíz, and María Guzmán, and their conjugal partnership in order to produce information under said defendants' control needed to amend the complaint to add more predicate acts to the alleged RICO enterprise, and for a grant of 15 days after such evidence is produced to oppose the motion for dismissal and amend the complaint. Defendants have filed an opposition to plaintiff's motion to allow additional discovery and to grant leave of time to oppose the motion to dismiss, and plaintiff has filed a reply to defendant's opposition. Defendants then

filed a motion to strike plaintiff's reply, which has been opposed by plaintiff. We DENY defendants' motion to strike plaintiff's reply.

After considering the entire record in this case, including plaintiff's motion and the various oppositions and replies, we GRANT plaintiff's motion and WILL ALLOW plaintiff to pose interrogatories against Continental Supplies, Corp., Efraín Ortíz, and María Guzmán, and their conjugal partnership. We likewise GRANT plaintiff a period of 15 days after such discovery has been produced to oppose the motion for dismissal filed by defendants Cuevas Cuevas, his spouse Guzmán and their conjugal relationship, Cuevas Ramos, his spouse Guzmán, and their conjugal relationship, and Family Restaurant, Inc. The motion to dismiss will be held in abeyance until such time as the discovery has been provided.

Plaintiff has filed a September 9, 1992 opposition to a motion allegedly filed by Continental Supplies which dealt with plaintiff's request for additional discovery. Our search of the case-file and inquiry of the Clerk's office has produced no record that any such motion was ever filed by Continental Supplies. We thus take no action on plaintiff's September 9 filing.

SO ORDERED.

San Juan, Puerto Rico, this 3rd day of February, 1993.

GILBERTO GIERBOLINI

Chief, U.S. District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

JOSE M. TOUS INC. ET ALS.
Plaintiff

v.

CONTINENTAL SUPPLIES,INC. ET. ALS.
Defendant

Civ. NO. 90-2625(GG)

INTERROGATORIES

To: Continental Supplies, Corp., Efraín Ortíz personally and as President of Continental Supplies, Corp., and María Guzmán and their conjugal partnership.

From: Plaintiff

Through: Augusto A. Cirino Gerena, Esq.

With the motion titled MOTION TO ALLOW DISCOVERY AND TO GRANT A LEAVE OF TIME are the invoices from Continental Supplies, Corp., addressed to Bonanza from the equipment sold to Bonanza and or Héctor Cuevas and or Héctor Cuevas Ramos. With the initials of the counsels at the top right hand of the margin. Using said

invoices answer the following questions:

1. Describe where every single of the items sold to Bonanza and or Héctor Cuevas and or Héctor Cuevas Ramos, were purchased by Continental Supplies Corp, detailing:

a. The manufacturing company or the supplier of the equipment, address, and telephone number.

b. Describe how did they were ordered, specifying the document, invoices, or any document in order to have it ordered. Specifying the invoice number or order number, or any number that could identify the order. Specifying time, place and content, on every single order. (Produce photocopy of the documents referred to).

c. If the equipment was purchased using the telephone, specify time, place, and content. When was it made, who made the telephone call, to whom the telephone call was made and the information

communicated.

d. If the equipment was purchased using a Fax machine, specify when, who made use of the machine, to whom was the information or the document sent and time, place and content of the information communicated. (Include photocopy of said document).

e. Produce any document received from the manufacturing company or the supplier or entity that sent the equipment in question to Puerto Rico. Specifying time, place and content.

f. Include photocopy of any fax document sent to the manufacturing company or any supplier of the equipments to Continental Supplies, Corp., or received by Continental Supplies, Corp., from any manufacturing company or supplier concerning the above equipment appearing on the above cited and included invoices. Specifying time, place and content.

2. How the payments were made to the suppliers or the manufacturers of the equipment in question, detailing:

a. If by check, describe when was it paid, to whom, and what vehicle or operation was used in order to sent the check to the creditor. Specifying time, place and content

b. If by a letter of credit, describe when was it paid, to whom, and what vehicle or operation was used in order to sent the check to the creditor. Specifying time, place and content.

c. If any other type of way for the payment please state so and give specific details as to how the payments were made. Specifying time, place and content.

3. Produce every document in relation to the purchase and sale of the equipment in question, and every document in relation to the delivery of the equipment in question.

4. Specifying time, place and content of any document or any telephone call as to how the walking cooler was ordered and dispatched and paid.

5. Specifying time, place and content of any document or any telephone call as to how the Montague ovens were ordered and dispatched and paid.

6. Specifying time, place and content of any document or any telephone call as to how the ice maker Crystal was ordered and dispatched and paid.

7. Specifying time, place and content of any document or any telephone call as to how the Hot Food Drawer Wells and Fryer Wells were ordered and dispatched and paid.

8. Specifying time, place and content of any document or any telephone call as to how the Pot Rack and Wire Shelving were ordered and dispatched and paid.

8. Specifying time, place and content of

any document or any telephone call as to how the equipment that appears from the sworn statement before state deputy attorney ordered and dispatched. (Enclosed photocopy of the sworn statement).

In San Juan, Puerto Rico, on August 17, 1992.

I hereby certify that a true copy of the foregoing motion has been delivered to counsel: A. Rivera Valdivieso, Esq, Avenida Ponce De León #654, Edificio Texas-Oficina 201 Hato Rey, P.R. 00918; Rafael F. Castro Lang, Esq, P.O Box 3222, San Juan, P.R. 00902-3222, Augusto A. Cirino Gerena, Esq. Apartado 2042, Hato Rey, P.R. 00919

Law Offices José Tous-Rodríguez
P.O. Box 360532
San Juan, P.R. 00936
Tel. (809) 765-6433

By:_____
José M. Tous-Rodríguez
USDC #129007

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

JOSE M. TOUS INC. ET ALS.
Plaintiff

v.

CONTINENTAL SUPPLIES,INC. ET. ALS.
Defendant

Civ. NO. 90-2625(GG)

ANSWER TO THE INTERROGATORIES

TO PLAINTIFF JOSE M. TOUS

COMES NOW Efraín Ortiz, personally and as President of Continental Supplies, Corp., and submits his answer to the interrogatories propounded by plaintiff.

1.a. The Ice Maker, tha walking cooler, the hot food drawer and the convention oven Montague, all were purchased from J. COBO ANA ASSOCIATES, INC., P.O. Box 450218, Miami, Florida 33145.

The wire shelving, the fryers and stock pot were from our own inventory. They were in stock and their manufacturer cannot be identified.

The sink, salad bar, working table and

galvanized pot rack were purchased from Metal Equipment Corp. in Puerto Rico.

The comb. grill and broiler was purchased from COMSTOCK CASTLE STOVE CO., through Universal Marketing, Inc., 2514 E. Tremont Ave., New York, N.Y. 10461.

The Glo-Ray hatco was purchased from H.D. Sheldom, 19 Union Sq. West, New York, N.Y. 10461.

The Glo-Ray hatco was purchased from H.D. Sheldom, 19 Union Sq. West, New York, New York 10003.

b. The equipment purchased outside Puerto Rico was ordered by mail.

c. No.

d. No.

e. The document requested is not available.

f. N/A.

2. a. The equipment purchased was paid by check and sind [sic] by mail.

b. No.

c. N/A.

3. See attached copy of the available documents.

4. See answer #1.

5. See answer #1.

6. See answer #1.

7. See answer #1.

8. The pot rack was purchased from metal Equipment in Puerto Rico and the were shelving was in stock.

9. They were the same.

EFRAIN ORTIZ

AFF. NO. 14,842

Sworn and subscribed before me the undersigned Notary Public by Efraín Ortiz, of legal age, married, business men and resident of San Juan, Puerto Rico.

On April 22, 1993.

I hereby certify that a copy of the above answer to interrogatories was notified to Mr. José M. Tous, P.O. Box

360532, San Juan, Puerto Rico 00936; Mr. A. Rivera Valdivieso, Ponce de León Ave. #654, Texas Building, Hato Rey, Puerto Rico 00918; Mr. Rafael F. Castro Lang, P.O. Box 3222, San Juan, Puerto Rico 00902.

In San Juan, Puerto Rico, on April 22, 1993.

AUGUSTO A. CIRINO GERENA
P.O. Box 192042
Hato Rey, Puerto Rico 00919-2042
Tels. 763-2438, 763-2811
USDC-PR 113301

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

JOSE M. TOUS, INC., JOSE M. TOUS, HERMANOS RAMON, INC., REYNALDO LUIS RAMON AND HIS SPOUSE IRIS DELIA RODRIGUEZ RIVERA AND THEIR CONJUGAL PARTNERSHIP Plaintiff vs. CONTINENTAL SUPPLIES INC., EFRAIN ORTIZ AND HIS WIFE MARIA GUZMAN AND THEIR CONJUGAL PARTNERSHIP, HECTOR CUEVAS CUEVAS AND HIS WIFE MARGARITA GUZMAN AND THEIR CONJUGAL PARTNERSHIP HECTOR CUEVAS RAMOS AND HIS WIFE ANNETTE ROMAN AND THEIR CONJUGAL PARTNERSHIP, MIGUEL ELIAS BONETA AND HIS WIFE LUISA CABORROVY AND THEIR CONJUGAL PARTNERSHIP, FAMILY RESTAURANTS, INC., JOSE NAZARIO AND HIS SPOUSE ENID CRUZ AND THEIR RESPECTIVE LEGAL SOCIETY. Defendant	Case No.90-2625(GG) Plaintiff Demand Trial by Jury

AMENDED COMPLAINT

TO THE HONORABLE COURT:

COME NOW, the plaintiff, pro se, and the joining plaintiff Reynaldo Luis Ramón, his wife Iris Delia Rodríguez and their conjugal partnership, and respectfully states and prays:

COUNT I

1. This action arises under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. Sec. 1961 et. seq., and specially 18 U.S.C. Sec. 1964 (c). This Court has jurisdiction over the subject matter of Count I, II & IV, V of this Complaint under 28 U.S.C. Sec. 1331. The venue properly lies with this court by reason of 18 U.S.C. Sec. 1965 (a). The claim set
forth in Count III & VI has pendent jurisdiction over Count I & IV.

THE PARTIES

2. Continental Supplies, Corp., sells and distributes restaurant appliances, and supplied restaurant equipment to

plaintiffs brought from mainland U.S.A.

3. Efraín Ortíz Claudio is president and works for Continental Supplies, Corp.

4. Héctor Cuevas Cuevas is president and sole stockholder of Family Restaurant Inc., and said corporation owns the rights for the franchise and/or trademark of Bonanza in Puerto Rico, with principal offices in mainland U.S.A.; Family Restaurant, Corp., has its principal offices located at the old Housing Investment building in Hato Rey.

5. At the time of the alleged fact, Héctor Cuevas Cuevas was a stockholder from Banco Nacional, N.A.

6. Héctor Cuevas Ramos is the son of Héctor Cuevas Cuevas, and at the time of the alleged facts had his office at the Old Housing Investment Building, in Hato Rey, where his father Héctor Cuevas Cuevas has his office.

7. Miguel Elías Boneta worked for

Fidelity National Leasing Co., and as part of the scheme, in both cases introduced plaintiff José Tous and Reynaldo Ramón to Héctor Cuevas Cuevas and Héctor Cuevas Ramos.

8. Continental Supplies, Corp., is a corporation authorized to make business in Puerto Rico and imported restaurant equipment from mainland U.S.A., affecting interstate commerce in both joining cases.

9. Family Restaurant, Inc., solely owned by Héctor Cuevas Cuevas, is a corporation in Puerto Rico that handles the affairs of the trademark and or the franchise of Bonanza, from U.S.A., and affects interstate commerce.

10. Banco Nacional, N.A., is a banking institution in Puerto Rico chartered by the National Federal Reserve Board (not a defendant in this case because it is under a receivership by the FDIC),

affecting interstate commerce.

11. Hermanos Ramón, Inc., is a corporation created under the laws of the Commonwealth of Puerto Rico, and bought the trademark Gourmet Famous Fried Chicken & Biscuit for its use from Family Restaurant, Inc., on July 22, 1987, appearing in the act for said corporation, Héctor Cuevas Cuevas.

12. Reynaldo Luis Ramón is a citizen of the United States and a resident in Caguas, Puerto Rico. At the time of the alleged facts he was in charge of developing a site for a restaurant of fast food at the town of Cidra, for the corporation Hermanos Ramón, Inc.

13. Reynaldo Ramón is married to Iris Delia Rodríguez Rivera, and at the time of the alleged facts, had no experience in the restaurant business.

14. Eugenio Pérez Matos is President of Fidelity National Leasing, Inc., not

brought into this action because he went bankrupt.

15. José Nogueras is Vice-President of Fidelity National Leasing, Inc., not brought into this action because he went bankrupt.

16. Miguel Elías Boneta at the time of the facts alleged was an employee from Fidelity National Leasing, Corp.

17. José (Nenón) Nazario, at the time of the facts alleged, worked at the same office with Héctor Cuevas Cuevas and Héctor Cuevas Ramos. Although he could be found at the offices of Fidelity National Leasing, Corp., making administrative tasks.

18. Félix R. Pacheco at the time of the alleged facts was an officer from Banco Nacional, N.A.

19. Fidelity National Leasing, Corp., and Family Restaurant, Inc., had their main offices at the same floor of the old

Housing Investment building in Hato Rey.

20. MARIA GUZMAN. MARGARITA GUZMAN, ANNETTE ROMAN, LUISA CABORROVY, ENID CRUZ, are the respective spouses of defendants. Plaintiff has no reason to believe that they have been involved in the conspiracy and the violations of law alleged below. Nevertheless, under the law of Puerto Rico, in actions affecting community property both spouses must be included as parties and must be served with process independently in order to protect the separate interest of each spouses. Alicea et. als. v. Valle Bello, Inc., 111 D.P.R. 11; 11 Official Translations of the Supreme Court of P.R. 1075 (1982). For those reasons, the conjugal partnership ("sociedad de gananciales") has also been included as a defendant.

COUNT I AND THE SCHEME TO DEFRAUD AND CONSPIRACY

This following count from Reynaldo Ramón et. als., was dismissed by the District Federal Court without prejudice. (See motion accompanied in order to admit the joining cause of action).

21. With the help and access of fact of Miguel Elías Boneta, that worked for Fidelity National Leasing, Corp., at the time of the alleged facts, defendants lured Reynaldo Ramón to meet with both defendants Héctor Cuevas Cuevas and Héctor Cuevas Ramos, who handle the franchise known as Bonanza in Puerto Rico in order to purchase and develop a fast food store for Hermanos Ramón, Inc., under the trademark name Gourmet Famous Chicken 'n Biscuit & Design, owned by Family Restaurant, Inc.

22. With the help and access of fact of Miguel Elías Boneta, defendant José Nazario produced the package for the commercial loan and leasing for Hermanos

Ramón Inc., while working for Fidelity National Leasing, Corp.

23. With the help and access of fact of defendants, Family Restaurant, Corp., sold to Hermanos Ramón, Inc., some used equipment, brought originally from mainland U.S.A., in an amount not determined at this moment because of the pattern developed by defendants. But acording to Héctor Cuevas Cuevas it was in the amount of fourty thousand dollars.

24. From a document supplied by Banco Nacional, N.A., it appears that the equipment sold was in the amount of sixty four and seven hundred dollars ($64,700), plus some other new equipment bought from Continental Supplies, Corp, and brought from mainland U.S.A., at the recommendation of Héctor Cuevas Ramos.

25. The used equipment sold by Family Restaurant, Corp., was formally used in a franchise known as Gourmet Famous Chicken

'n Biscuit & Design, located at the 65th. Infantry Ave., owned by Family Restaurant, Inc. On August 31, 1987. Continental Supplies delivered to Hermanos Ramón, Inc., a considerable amount of equipment brought from Harold Leghard, Corp., from the state of New Jersey.

26. According to documents produced by Banco Nacional, N.A., under the consideration for the purchase of said equipment from Family Restaurant, Inc., and because defendants had the know how to develop the future franchise, and with the presence of Hétor Cuevas Cuevas, the loan and the leasing were granted, with all the details supplied to Banco Nacional, N.A., by Fidelity National Leasing, Inc.. The amount approved by Banco Nacional, N.A. was of seventy seven thousand dollars six hundred and four dollars with thirty two cents

($77,604.32).

27. On May 5, 1987 Banco Nacional, N.A., with the help and the access of fact from Félix Pacheco from Banco Nacional, N.A., gave a credit and notified it to Fidelity National Leasing, Inc., through a credit advice number 5555-0001 0103001831, item number 006755, without delivering any money to plaintiff Reynaldo Ramón et. als, using the U.S. Mail for furthering the fraud in violation of Title 18 U.S.C. Section 1341.

28. On May 15, 1987, Fidelity National Leasing, Inc., notified by letter to Hermanos Ramón, Inc., of the assignment of the equipment leased to Banco Nacional, N.A., using the U.S. Mail for furthering the fraud in violation of Title 18 U.S.C. Section 1341.

29. After the credit approval from plaintiff monies to Fidelity National Leasing, Inc., on May 26, 1987, Banco

Nacional, N.A., notified a letter, signed by Félix Pacheco, to debtor Hermanos Ramón, Inc., concerning the approval of the commercial loan, with the chattel mortgage and the first mortgage over the tract of land using the U.S. Mail for furthering the fraud in violation of Title 18 U.S.C. Section 1341. As another predicate act on August 25, 1987, Continental Supplies, Corp., sent the original of the invoice #2073 to Gourmet Famous Chicken 'n Biscuit & Design, using or causing the use of the U.S. Mail in the fraud committed in violation of Title 18 U.S.C. Section 1341.

30. With the help and access in fact of defendants, they were able to divert the monies from plaintiff, and none of the officers of the corporation Hermanos Ramón, Inc., or Reynaldo Ramón or his wife or their conjugal partnership, never saw or endorsed any check for same amount

on behalf of him or Hermanos Ramón Inc. Debtor Hermanos Ramón, Inc., never made a check to pay either Héctor Cuevas Cuevas or Family Restaurant, although Reynaldo Ramón on behalf of Hermanos Ramón, Inc., instructed José (Nenón) Nazario to stop the payment to Héctor Cuevas Cuevas, until the completion of his contractual obligations of counseling for the stablishment of the trademark Gourmet Famous Chicken 'n Biscuit & Design.

31. The credit given to Fidelity National Leasing by Banco Nacional, Inc., from the commercial loan granted, guaranteed by the chattel mortgage and the tract of land, was in the amount of seventy seven thousand dollars six hundreds and four dollars with thirty two cents ($77,604.32).

32. The assessed value of the chattel mortgage was in the amount of fifty thousand dollars ($50,000), and the

assessed value of the tract of land, given by Reynaldo Luis Ramón as a collateral for the commercial loan, was in the amount of eighty five thousand dollars ($85,000).

33. Plaintiff Reynaldo Ramón gave a tract of land, appraised in the amount of eighty five thousand dollars ($85,000), as collateral to the loan for the difference of twenty seven thousand and six hundred and four with thirty two cents ($27,604. 32), to Banco Nacional, N.A., through Fidelity National Leasing, Inc., altering the charter of the leasing company and turning it as commercial bank, because Banco Nacional gave only fifty thousand dollars ($50,000) as a chattel mortgage for the equipment.

34. The first mortgage over the tract of land, given as a collateral was for the amount of sixty thousand dollars ($60,000).

35. With the help and access to the facts of the defendants, and to further the fraud, they retained the difference between the chattel loan and the rest of the commercial loan granted by Banco Nacional, N.A., disbursing some undetermined amount of money and unknown as up to this date, only at the request of Reynaldo Ramón.

36. Héctor Cuevas Cuevas, although delivered the logo for the trademark, never delivered or produced any other document of the franchise, as for example: the receipts, style and description of the equipment used by the franchise, description of all the utilities, description of the uniforms with the style used by the workers, training of the personnel; Héctor Cuevas Cuevas promised to give all the counsel and knowledge and all the support for the enterprise to Hermanos Ramón Inc.

37. Héctor Cuevas Cuevas delegated in his son Héctor Cuevas Ramos, which never accomplished the task arranged between the parties.

38. The trademark Gourmet Famous Chicken'n Biscuit & Design was sold to Hermanos Ramón Inc. by Family Restaurant Inc., represented in the act by Héctor Cuevas Cuevas, with an affidavit #517 before the Notary Public Vionette Benítez, duly transferred and registered at the State Department for the Commonwealth of Puerto Rico.

39. Thereafter Héctor Cuevas Cuevas and Cuevas Ramos did not fulfill the agreements made, by which Banco Nacional, N.A., exercised its rights, filing a complaint in the Federal District Court, case 90-1202 (HL), foreclosing the mortgage against the tract of land, trying to collect the full amount of money lent to debtor Hermanos Ramón,

Corp., and Reynaldo Ramón and his wife Iris Delia Rodríguez and their conjugal partnership. The judgment was notified on November 9, 1990, using or causing the use of the U.S. Mail for furthering the fraud in violation of Title 18 U.S.C. Section 1341.

40. In the complaint filed at the Honorable Federal Court for the District of Puerto Rico and served through edicts upon the person of Reynaldo Luis Ramón, by Banco Nacional, N.A., appears a history as follows:

a. That Banco Nacional, N.A., is the holder of a promissory note executed by José Nogueras and Eugenio Pérez Matos, d/b/a/ Cayey Food, for the principal amount of ninety two thousand dollars, three hundred and seven dollars with ninety three cents ($92,307.93), subscribed on July 14, 1988.

b. On September 21, 1988, José

Nogueras and Eugenio Pérez Matos, d/b/a Cayey Food, delivered the note of sixty thousand dollars ($60,000) to Banco Nacional executed as a Pledge Agreement before notary public Miguel Angel Cuadros, as a statement of assignment of accounts receivable due under the equipment lease dated May 15, 1987.

c. Pursuant to the pledge agreement herein before referred to, José Nogueras and Eugenio Pérez Matos, d/b/a Cayey Food, also delivered to Banco Nacional, N.A. a mortgage note payable to the bearer on demand for the principal amount of sixty thousand dollars ($60,000) with interest at 10% per annum, plus the sum of six thousand dollars to cover cost expenses.

41. Such above facts were alleged in the complaint filed by Banco Nacional, represented by counsel Madeleine Riefkohl, against Reynaldo Luis Ramón

and/or Hermanos Ramón Inc. at the Federal District Court for Puerto Rico, case number 90-1202 (HL).

In other words, they used the same note supposedly to be the collateral to Banco Nacional, N.A., to obtain another loan from Banco Nacional; this time on behalf of José Nogueras and Eugenio Pérez Matos d/b/a Cayey Food, both men respectively President and Vice president from Fidelity National Leasing.

42. On May 20, 1988, Fidelity National Leasing filed another complaint at the Honorable Superior Court from Caguas, case number 88-1128, obtaining a judgment on October 27, 1989, "as the ultimate end of the enterprise", moving the judicial system and committing a fraud at the Superior State Court and using or causing the use of the U.S. Mail in violation of Title 18 U.S.C. Section 1341, when they obtained a judgment in

its favor and claiming the amount of seventy one thousand four hundred twenty one with twenty cents as a creditor of same amount, and it was subsequently communicated to the parties. A fraud and a perjury was committed when a sworn statement was filed to obtain a judgment by default in the state court and diverting the equipment and or the monies from Hnos. Ramón Inc. and/or Reynaldo Luis Ramón.

43. On July 11, 1989, Miguel A. Cuadros, according to the Superior Court's case record, sent a letter to judge Muñoz Arill, stating that following his instructions he was sending a judgment and a sworn statement for the case of record, in furtherance of the conspiracy and the pattern device by defendants, using the U.S. mail, in violation of U.S.C. Title 18 Section 1341.

44. According to Court's documents, José

A. Nogueras, Vice president of Fidelity National Leasing, Inc., moved to the site where the equipment was deposited by Hermanos Ramón, Inc., and with the help of Rubén Coriano, marshall of said Honorable Superior Court, took possession of said equipment and retained the same, selling the equipment thereafter and thus committing a criminal act under Articles 165-166 of the Puerto Rico Penal Code which conveys a penalty of more than one year in jail.

45. Defendants concealed all important facts to plaintiff, and plaintiff reasonably relied upon defendant's misrepresentations, silence and nondisclosure.

46. These fraudulent misrepresentation were made by defendants with the intent and purpose of deceiving plaintiff, although they were under a fiduciary relationship.

47. All expertise and kitchen appliances sold to Hermanos Ramón, Inc., were not for resale and under Puerto Rico law, their legal relation was controlled by the Civil Code and not by the Commercial Code. (See Pescadería Rosas, Inc. v. Lozada, 166 D.P.R. 474; 16 Official Translations of the Supreme Court of P.R. 579 (1985).

VIOLATIONS OF RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

COUNT I

48. With the help and access of fact of defendants Félix Pacheco, Héctor Cuevas Cuevas, Héctor Cuevas Ramos, Miguel Elías Boneta, José Nazario, José Nogueras, Eugenio Pérez Matos by the acts set forth from count 21 to count 47, have devised and participated in an unlawful scheme and artifice, and in furtherance of their unlawful conspiracy, on more than two occasions have used the United States and

other instrumentalities of interstate commerce of the statutory prohibition against fraud, Title 18 U.S.C. 1341. These acts through a pattern of racketeering activity within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Sec. 1961, 1962 (c) and (d).

49. Family Restaurant, Corp., Banco Nacional N.A., Fidelity National Leasing, Inc., are enterprises within the meaning of 18 U.S.C. Sec. 1961 (4) and trough out their pattern and activities affected the interstate commerce.

50. The fraudulent misrepresentation set forth above were made by defendants Félix Pacheco, Héctor Cuevas Cuevas, Héctor Cuevas Ramos, Miguel Elías Boneta, José Nazario, José Nogueras, Eugenio Pérez Matos to plaintiff Hermanos Ramón, Inc., and Reynaldo Ramón and his wife Iris Delia Rodríguez and their conjugal

partnership.

51. Such mail fraud constitute racketeering activity as defined in 18 U.S.C. Sec. 1961 (1) (B).

52. Defendant's multiple fraudulent misrepresentations, as detailed above, constitute a pattern of racketeering activity within the meaning of 18 U.S.C. 1961 (5).

53. Defendant and his agents, associates and representatives, conducted, and have conspired to conduct, the affairs of the above named corporations, Family Restaurant, Corp., Banco Nacional N.A., Fidelity National Leasing, Inc., through a pattern of racketeering activity in violation of 18 U.S.C. Sec. 1962 (c) and (d).

54. As a direct and proximate result of said violations of 18 U.S.C. Sec. 1962 (c) and (d), plaintiffs Hermanos Ramón, Inc., and Reynaldo Ramón and his wife and

their conjugal partnership have suffered actual damages as a result of injury of its business and property.

55. Defendants Félix Pacheco, Héctor Cuevas Cuevas, Héctor Cuevas Ramos, Miguel Elías Boneta, José Nazario, José Nogueras, Eugenio Pérez Matos are liable to plaintiff for treble damages, together with all costs of this section plus reasonable attorneys fees, all as provided under 18 U.S.C. 1964 (c).

56. The count arises under the Racketeering Influenced and Corrupt Organization Act, 18 U.S.C. 1961 et. seq., and it is extended to Puerto Rico under 18 U.S.C. 1961 (2).

57. Defendant Félix Pacheco, Héctor Cuevas Cuevas, Héctor Cuevas Ramos, Miguel Elías Boneta, José Nazario, José Nogueras, Eugenio Pérez Matos, using Fidelity National Leasing, Corp., Banco Nacional, N.A., and Family Restaurant,

Corp., holder of the rights from the franchise known as Bonanza and holder of the trademark rights known as Gourmet Famous Chicken 'n Biscuit & Design and, by deceitful means and artful practice, converted to his own use funds of plaintiff, as more fully described in paragraph 21 to 47 of Count I of the present complaint.

58. Such intentional acts on the part of defendant as described above constitute a felony and theft by conversion, under Puerto Rico Penal Code, Articles 165-166, carrying a penalty of a minimum of one year in prison and a maximum of ten years.

59. Such intentional acts on the part of defendant as described above constitute a felony and aggravated robbery, under Puerto Rico Penal Code, Articles 165-166, carrying a penalty of a minimum of one year in prison and a maximum of ten

years.

60. Such intentional acts on the part of defendant as described above constitute perjury in the State Court, under Puerto Rico Penal Code, Article 225 concerning perjury, carrying a penalty of a minimum of one year in prison and a maximum of ten years.

61. Such acts of robbery of defendant's property constitute "racketeering activity as that term is defined under 18 U.S.C. Sec. 1961 (1) (a). Such multiple acts further constitute a pattern of racketeering activity under 18 U.S.C. 1961 (5).

62. Such acts violate Title 18 U.S.C. 1961 et. seq., and 18 U.S.C. 1962 (c) and (d).

63. As a direct and proximate result of defendant's violation of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. 1961 et. seq., plaintiff has

been injured in its property and business itemized as follows:

A. Reynaldo Luis Ramón and his wife Iris Delia Rodríguez and their conjugal partnership lost a property wih an assessed value of eighty five thousand dollars ($85,000.00) at the time of the alleged facts.

B. The value of the business damage of Hermanos Ramón, Inc., is in the amount of two hundred and thrirty six ($236,000.00) thousand dollars.

C. The going concern of the business of Hermanos Ramón, Inc., as up to the filing of this complaint is three hundred fourty four hundred thousand dollars eight hundred thirty two with fourty cents ($344,832.40), based on a ten percent (10%) return value compounded anually, as up to this filing of the complaint. The amount accrues annually and up to the moment that the judgment becomes firm and

final.

64. Defendant is liable to Plaintiff for treble damages, together with all costs of this action, plus reasonable attorneys fees as provided by 18 U.S.C. 1964 (c).

WHEREFORE: plaintiff prays as follows:

a. That plaintiff be granted judgment against defendant in the total amount of all damages suffered by its virtue of his wrongful acts;

b. That plaintiff have judgment against defendant for treble damages suffered by reason of injury to its violations of 18 U.S.C. Sec. 1962 (c).

c. That plaintiff have judgment against defendant for treble damages suffered by reason of injury to its business and property as a result of defendant's violations of Puerto Rico Penal Code, Articles 165, 166, 225, carrying a penalty of a minimum of one year in

prison and a maximum of ten years.

d. That plaintiff have judgment against defendant for all costs including reasonable attorney's fees; and

e. That this Court grant plaintiff such other and further relief as it deems just and appropriate under the circumstances.

COUNT II

65. Plaintiff realleges paragraphs 21 to 47 from count I.

66. In violation of 18 U.S.C. Sec. 1962 (d), defendants Félix Pacheco, Héctor Cuevas Cuevas, Héctor Cuevas Ramos, Miguel Elías Boneta, José Nazario, José Nogueras, Eugenio Pérez Matos, using Fidelity National Leasing, Corp., Banco Nacional, N.A., and Family Restaurant, Corp., all persons as defined in RICO, as fully described on count I, conspired to violate 18 U.S.C. 1962 (c), to use said enterprises to conduct or participate, directly or indirectly in the conduct of

such enterprise's affair through a pattern of racketeering activity.

67. Fidelity National Leasing, Corp., Banco Nacional, N.A., and Family Restaurant, Corp., are enterprises affecting interstate commerce by virtue of purchases of supplies from out of state and performances which affect interstate commerce.

68. The conspiracy to use said enterpises in order to conduct or participate directly or indirectly of such enterprise's affair through a pattern of racketeering activity, as set above in paragraphs 21 to 47, and in furtherance of defendant's scheme to participate, directly or indirectly in the conduct of such enterprise's affair through a pattern of racketeering activity, utilized or caused the use of the U.S. Mail, U.S.C. Title 18 Sec. 1341. These mailings, and acts of fraud,

constitute a "pattern of racketeering activity", as defined in 18 U.S.C. Sec. 1961 (1) and (5). Defendants conspired to use Fidelity National Leasing, Corp., Banco Nacional, N.A., and Family Restaurant, Corp., for personal financial gain utilizing them to defraud and divert plaintiff's monies.

Wherefore: Plaintiff pray to enter judgment against defendants jointly and severally in the amount requested on Count II of the present complaint, and with such order and further relief as the Court deems proper and appropiate under the circumstances.

COUNT III UNDER PENDENT JURISDICTION

69. Plaintiff repeats and reallege paragraphs 21-47 of Count I from plaintiff Hermanos Ramón, Inc., and Reynaldo Ramón and Iris Delia Rodríguez and their conjugal partnership, and following paragraphs as fully as though

set forth herein.

70. Defendants committed intentional and or negligent acts in violation of article 1802 of the Puerto Rico Civil Code, in relation to intentional or negligent acts, causing personal damages to plaintiff.

71. Plaintiffs Reynaldo Ramón and Iris Delia Rodríguez and their conjugal partnership, have sustained damages on their personal character, by the acts set forth, proximate result of defendant's conducts.

72. Plaintiff have been subjected to stress, lost of their property and have been consistently suit in the state court by several plaintiff, because of the many debts they had to incurred, as a consequence of the racketeering acts from defendants, suffering personal damages for both plaintiffs in the amount of three hundred and fifty thousand dollars

($350,000.00).

PRAYER FOR RELIEF

THEREFORE, plaintiff respectfully prays to the Court as follows:

a. That judgment be entered against defendants on Count III of Hermanos Ramón, Inc., Reynaldo Ramón and Iris Delia Rodríguez and their conjugal partnership, under the racketeering inducement and corrupt organization, and that plaintiff be awarded single damages in the amount of three hundred thousand dollars ($300,000.00), for personal damages by the acts committed against their persons by said defendants.

b. That judgment be entered against defendants on Count I and II of the complaint for threefold the amount of damages sustained by plaintiff, pursuant to 18 U.S.C. Sec. 1964 (c).

c. That plaintiff be awarded the costs of this suit, including reasonable

attorneys fees, pursuant to 18 U.S.C. Sec. 1964 (c).

d. That judgment be entered against defendants on Count III of the complaint and that plaintiff be awarded damages in the amount of three hundred thousand dollars ($300,000.00).

e. That the court order defendants to account to plaintiff all moneys unlawfully diverted from plaintiff;

f. That the Honorable Court give all such order and further relief as this court deems just and equitable.

COUNT IV AND THE SECOND CASE TO DEFRAUD AND CONSPIRACY

73. Again Miguel Elías Boneta, on July 1987, lured plaintiff José M. Tous Rodríguez, in order to open a fast food restaurant, and introduced plaintiff to Héctor Cuevas Ramos and Héctor Cuevas Cuevas.

74. In an association of fact with

defendants, Héctor Cuevas Ramos, subscribed a contract with plaintiff José M. Tous, by which Hector Cuevas Ramos would counsel and advice plaintiffs in order to develop and establish a franchise in Puerto Rico, using the relationship of Bonanza with the community, that included among others: to plan the exterior and interior of the site in order to planned the space to installed the equipment, and obtaining all the necessary kitchen equipment from suppliers known through Bonanza, and training of the personnel.

75. Said contract was in consideration of three thousand dollars ($3,000.00); half of it would be paid in advance and the rest at the end of his contractual responsibilities. Said contract was performed in consideration that Héctor Cuevas Cuevas was the owner of Family Restaurant Inc., and he promised to

assist in any matter. Héctor Cuevas Ramos would assist in terms of training personnel, development of a menu for the restaurant, designing the interiors and exteriors of same restaurant, designing the plans for the kitchen, detailing the suppliers to be used for purchasing the food and buying all kitchen appliances from suppliers known by Bonanza, using the relationship of Bonanza with suppliers at the island.

76. That Héctor Cuevas Cuevas, as President of Family Restaurant, Corp, and sole owner of said corporation that owns the rights for the trademark and or franchise of Bonanza for Puerto Rico, in an association of fact, induced and participated in the racketeering pattern, stating, among other things, that Bonanza would help in the development of same franchise and would obtained the kitchen furniture of the restaurant in

less amount of money.

77. That Efraín Ortíz, president of Continental Supplies, Corp., in an association of fact, subscribe a quotation for the kitchen of the restaurant with the corporation seal and paper on behalf of Bonanza, and to Héctor Cuevas Cuevas, President, with prices higher than they are usually sold to the public, and brought said equipment from mainland U.S.A., affecting interstate commerce.

78. That according to a deposition by Efraín Ortíz, President of Continental Supplies, Inc., defendants Héctor Cuevas Cuevas, Héctor Cuevas Ramos and Efraín Ortíz met at Continental Supplies, Corp. offices, in order to prepare the quotation in question with the altered prices and addressed to Bonanza.

79. That Efraín Ortíz, as part of the association of facts, delivered the

restaurant equipment personally, and ordered to make a croquis to one of his employees, because there was no mechanical drawings, in order to installed the kitchen equipment.

80. That Héctor Cuevas Cuevas, in the association of facts and as part of the on going fraud, went to the site to be operated in order to inspect, and among others, suggested to torn down a wall in order to make more space.

81. In a requirements for admission, Héctor Cuevas Cuevas admitted the fact that he was present at the site while the construction was in progress.

82. Said quotation, made by Efraín Ortíz, in a association of facts with defendants was offered to plaintiff by Héctor Cuevas Ramos, as an intermediary, making plaintiff believed that it was cheaper because it was addressed to Bonanza and to Héctor Cuevas Cuevas,

Pres., and making it possible to divert the amount of more than thirty one thousand dolars two hundred nineteen with eighty cents ($31,219.80).

83. That Miguel Elías Boneta, again, took part in the racketeering pattern, when he delivered said altered quotation of the equipment to be leased to First Federal Savings Bank, in order to have some money released from an scrow account, after he tried to leased said kitchen appliances through Fidelity National Leasing, Corp., as in the case of Hermanos Ramón, Inc., with full knowledge that the prices were higher than usual.

84. The leasing was produced by Edna Rodríguez Surís, because First Federal did not have a licence to produce such financing. On February 18, 1988, a letter was sent to First Federal Savings and loan association by Edna Rodríguez

Surís, in order to communicate that the equipment was going to be obtained through Bonanza at a lower price, causing the use of the U.S. mail for furthering the fraud in violation of U.S.C. Title 18 Section 1341. On March 14, 1988, First Federal Savings bank returned tha book account #01-02130183, from an scrow account in the amount of $40,263.88, from plaintiff José Tous, causing the use of the U.S. mail for furthering the fraud in violation of U.S.C. Title 18 Section 1341.

85. In the association of facts, defendants made arrangements to have Wilfredo Rodríguez Torres, architect, to make the preliminary plans for the construction of the site site in order, to make possible the installation of the equipment on an specific place, to have the exteriors developed, and to develop the entrance and exit of the customers

within the store, and while giving the advice, Héctor Cuevas Ramos held meetings at the offices where his father works, at the old Housing Investment building, in Hato Rey.

86. Said architect had been making the plans for Bonanza, as it appears from a drawing in his office located in Roosevelt, Hato Rey.

87. Although a contract was made in order to have the complete development, including the kitchen appliances and construction for the amount of $100,000.00, later the architect demanded the full amount for construction, retaining the amount of one thousand dollars ($1,000.00), as a retainer.

88. In the process, Wilfredo Rodríguez Torres, architect, and while the enterprise was taking effect, wrote several letters to plaintiff José M. Tous on August 7, 1987, presenting the

proposal for his services, on September 8, 1987 sent an invoice for his services, on September 15, 1987 a letter was sent to the First Federal Savings, itemizing all his fees and how were they going to be paid, on September 17, 1987 a letter to the First Federal Savings itemizing all his proposed fees and making an estimate of $100,000.00 for construction and equipment, on September 28, 1987 a letter addressed to plaintiff José Tous referring to the fees and how are they will be paid, on September 30, 1987 a letter to plaintiff José Tous concerning the terms and conditions of the contract, on September 15, 1988 a certified letter to plaintiff José Tous concerning the conditions of the contract, on December 9, 1987 and May 18, 1988 a letter sent to plaintiff sending an invoice of his fees as up to that date. The letters used the U.S. mail for furthering the fraud in

violation of U.S.C. Title 18 Section 1341.

89. Because many of the equipment would not fit in the area to be installed, and because the money paid to Héctor Cuevas Ramos was by manager's checks under the name of the plaintiff, a receipt were requested from defendant Héctor Cuevas Ramos.

90. On April 13, 1988, Héctor Cuevas Ramos, and in an conspiration of facts with defendant José Nazario, brought what it was supposed to be a receipt from the monies diverted by defendants, asking for the signature of José M. Tous Rodríguez, as a prove that it was received that same date. Later plaintiff discovered that said receipt was really a supposedly intended contract and from its content maintained that Héctor Cuevas Ramos had sold the equipment to plaintiff. This was the first time that plaintiff knew that

said kitchen equipment had been sold by them.

91. The signature of plaintiff José Tous Rodríguez, was falsified in the contract-receipt, and was subsequently presented by Héctor Cuevas Ramos in a deposition under oath.

92. The installations of the electrical stoves and ovens was impossible as a three phase electrical line was required and would have been forced to be installed by plaintiff at a higher cost not foresee on the initial estimates. The cooler was so big that part of the site would be forced to be torn down in order to have it installed. Therefore new equipment had to be leased, changes had to be performed in order to install new gas equipment, a new mechanical plan had to be developed, and more money had to be spent with the loan interest from the bank runing against plaintiff.

93. Because defendants scheme, said business was open in September 1988 and closed in January 1989, becauselack of capital work originally destined from the monies diverted.

94. Said kitchen appliances in this second case and for said racketeering pattern, was brought from United States, therefore affecting interstate commerce.

95. That Efraín Ortíz, although denied the fact in a deposition under oath, knew Héctor Cuevas Cuevas before entering into the scheme and racketeering pattern and had direct business with him, and specially for the trademark Gourmet Famous Fried Chicken & Biscuit.

96. That the district court from Caguas already determined that Héctor Cuevas Cuevas was the direct responsible to have a credit open for Hermanos Ramón, Corp., for its trademark Gourmet Famous Fried Chicken & Biscuit, by Continental

Supplies, Corp., without an investigation of the credit's debtor, whereby they requested the signature of Reynaldo Ramón on some notes but did not requested the signature of his wife, both plaintiff in this action. By which their an action for collection of the monies owned by Hermanos Ramón, Inc., against their conjugal partnership, was dismissed.

97. That Efraín Ortíz denied, under oath, that he knew the Cuevas Cuevas and Cuevas Ramos, before the racketeering pattern and scheme was develop against plaintiff José M. Tous, although there is evidence from the kitchen equipment sold to Hermanos Ramón, Corp., that there was a purchase and sale agreement to supply Hermanos Ramón, Corp., with the restaurant equipment before this present fourth count.

98. Defendants concealed all important facts to plaintiff, and plaintiff

reasonably relied upon defendant's misrepresentations, silence and nondisclosure.

99. These fraudulent misrepresentation were made by defendants with the intent and purpose of deceiving plaintiff, although they were under a fiduciary relationship.

100. Efraín Ortíz committed the following predicate acts under the racketeering pattern set above, using the U.S. mail, thereby furthering the fraud in violation of U.S.C. Title 18 Section 1341. On March 4, 1988, using the U.S. mail requested some kitchen, among others, a Counter Fryer to Universal Marketing Inc., at the state of New York; on March 4, 1988, using the U.S. mail requested a Glo Ray food warmer Inc. to H.D. Sheldon & Co., at the state at the state of New York and on february 12, 1988 requested a cooler and other

equipment to J. Cobo & Associates, Inc., at the state of Florida.

VIOLATIONS OF RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

COUNT IV

101. With the help and access of fact of defendants Héctor Cuevas Cuevas, Héctor Cuevas Ramos, Miguel Elías Boneta, José Nazario, Efraín Ortíz by the acts set forth from paragraph 73 to paragraph 100, have devised and participated in an unlawful scheme and artifice, and in furtherance of their unlawful conspiracy, on more than two occasions have used the United States and other instrumentalities of interstate commerce of the statutory prohibition against fraud, 18 U.S.C. 1341. This acts through a pattern of racketeering activity within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Sec. 1961, 1962 (c) and (d).

102. Family Restaurant, Corp., Continental Supplies, Corp., are enterprise within the meaning of 18 U.S.C. Sec. 1961 (4), which are engaged in, or the activities of which affect interstate commerce as it appears from the facts alleged.

103. The fraudulent misrepresentation set forth above were made by defendants Efraín Ortíz, Héctor Cuevas Cuevas, Héctor Cuevas Ramos, Miguel Elías Boneta, José Nazario, against plaintiff José M. Tous and José M. Tous, Inc.

104. Such mail fraud constitute racketeering activity as that the term is defined in 18 U.S.C. Sec. 1961 (1) (B).

105. Defendant's multiple fraudulent misrepresentation as detailed above constitute a pattern of racketeering activity within the meaning of 18 U.S.C. 1961 (5).

106. Defendant and his agents,

associates and representatives conducted, and have conspired to conduct, the affairs of the above named corporations, Family Restaurant, Corp., Continental Supplies, Corp., through a pattern of racketeering activity in violation of 18 U.S.C. Sec. 1962 (c) and (d).

107. As a direct and proximate result of said violations of 18 U.S.C. Sec. 1962 (c) and (d), plaintiff José M. Tous and José M. Tous, Corp., sustained actual damages as a result of injury of its business and property as follows:

José M. Tous lost a property with an assessed value of four hundred ten thousand dollars ($410,000.00), up to the filing of the amended complaint.

The going concern of the business of José M. Tous at the fourth year after closing, consequence of the acts by defendants, is in the amount of five

hundred ninety nine thousand dollars and sixty seven cents ($599,677.00). Based on a ten percent (10%) return value compounded anually, as up to this filing of the complaint. The amount accrues annually and up to the moment that the judgment becomes firm and final.

108. Defendants Efraín Ortíz, Héctor Cuevas Cuevas, Héctor Cuevas Ramos, Miguel Elías Boneta, José Nazario, are liable to plaintiff for treble damages, together with all costs of this section plus reasonable attorneys fees, all as provided under 18 U.S.C. 1964 (c).

109. The count arises under the Racketeering Influenced and Corrupt Organization, 18 U.S.C. 1961 et. seq. and it is extended to Puerto Rico under 18 U.S.C. 1961 (2).

110. Defendant Efraín Ortíz, Héctor Cuevas Cuevas, Héctor Cuevas Ramos, Miguel Elías Boneta, José Nazario, using

Continental Supplies, Corp., and Family Restaurant, Corp., and by deceitful means and artful practice, converted to his own use funds of plaintiff, as more full described in paragraph 73 to 100 of Count IV of the present complaint.

111. Such intentional acts on the part of defendant as describes above constitute a felony and theft by conversion, under Puerto Rico Penal Code, Articles 165-166, carrying a penalty of a minimum of one year in prison and a maximum of ten years.

112. Such intentional acts on the part of defendant as describes above constitute a felony and aggravated robbery, under Puerto Rico Penal Code, Articles 165-166, carrying a penalty of a minimum of one year in prison and a maximum of ten years.

113. Such intentional acts on the part of defendant as describes above

constitute perjury, under Puerto Rico Penal Code, Article 225 concerning perjury, carrying a penalty of a minimum of one year in prison and a maximum of ten years.

114. Such acts on defendant's constitute "racketeering activity as that term is defined under 18 U.S.C. Sec. 1961 (1) (a). Such multiple acts further constitute a pattern of racketeering activity under 18 U.S.C. 1961 (5).

115. Such acts violates title 18 U.S.C. 1961 et. seq., and 18 U.S.C. 1962 (c) and (d).

116. As a direct and proximate result of defendant's violation of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. 1961 et. seq., Plaintiff has been injured in its property and and business in the amount of $599,677.00.

117. Defendant is liable to Plaintiff for treble damages, together with all

costs of this action, plus reasonable attorneys fees as provided by 18 U.S.C. 1964 (c).

Wherefore: plaintiff prays as follows:

a. That plaintiff be granted judgment against defendant in the total amount of all damages suffered by its virtue of his wrongful acts;

b. That plaintiff have judgment against defendant for treble damages suffered by reason of injury to its violations of 18 U.S.C. Sec. 1962 (c).

c. That plaintiff have judgment against defendant for treble damages suffered by reason of injury to its business and property as a result of defendant's violations of Puerto Rico Penal Code, Articles 165-166, carrying a penalty of a minimum of one year in prison and a maximum of ten years.

d. That plaintiff have judgment against defendant for all costs including

reasonable attorney's fees; and

e. That this court grant plaintiff such other and further relief as it deems just and appropriate under the circumstances.

COUNT V

118. Plaintiff realleges paragraphs 73 to 100. In violation of 18 U.S.C. Sec. 1962 (d), defendants Héctor Cuevas Cuevas, Héctor Cuevas Ramos, Miguel Elías Boneta, José Nazario, using Continental Supplies, Corp., and Family Restaurant, Corp., all persons as defined in RICO, commencing in about July 1987, conspired to violate 18 U.S.C. 1962 (c), to use said enterprises to conduct or participate, directly or indirectly in the conduct of such enterprise's affair through a pattern of racketeering activity.

119. Family Restaurant, Corp., through the franchise Bonanza with main offices in mainland U.S.A., and Continental

Supplies, Corp., are enterprises affecting interstate commerce by virtue of purchases of supplies from out of state and performances which affects interstate commerce.

120. The conspiracy to use said enterpises in order to conduct or participate directly or indirectly of such enterprise's affair through a pattern of racketeering activity, as set above in count 73 to count 100, and in furtherance of defendant's scheme to participate, directly or indirectly in the conduct of such enterprise's affair through a pattern of racketeering activity, utilized the U.S. mail Title 18 U.S.C. s. 1341. These mailings, an acts of fraud constitute a "pattern of racketeering activity", as defined in 18 U.S.C. s. 1961 (1) and (5). Defendants conspired to use Family Restaurant, Corp., Continental Supplies, Corp., for

personal financial gain utilizing them to defraud and divert plaintiff monies.

Wherefore: Plaintiff pray to enter judgment against defendants jointly and severally in the amount requested on Count IV of the present complaint, and with such order and further relief as the Court deems proper and appropiate under the circumstances.

COUNT VI UNDER PENDENT JURISDICTION

121. Plaintiff repeats and realleges paragraphs 73 to 100 of Count IV, from plaintiff José M. Tous et. als., and following paragraphs as fully as through set forth herein.

122. Defendants committed intentional and or negligent acts in violation of Article 1802 of the Puerto Rico Civil Code, concerning intentional or negligent acts.

123. Plaintiff have been injured on its personal character, and suffered

emotional stress, mental anguish by the acts set forth, proximate result of defendant's conduct.

124. Plaintiff have been suit by First Federal Savings and Loan Association, as well as José Santiago, Corp., suffering personal damages in the amount of one hundred fifty thousand dollars ($150,000.00).

PRAYER FOR RELIEF

THEREFORE, plaintiff respectfully prays to the Court as follows:

a. That judgment be entered against defendants on Count IV of José M. Tous et. als. claim, under the Racketeering Inducement and Corrupt Organization Act.

b. That judgment be entered against defendants on Counts IV and V of the complaint for threefold the amount of damages sustained by plaintiff, pursuant to Title 18 U.S.C. Section 1964 (c).

c. That plaintiff be awarded it's cost

of this suit, including attorneys fees, pursuant to 18 U.S.C. Section 1964 (c).

d. That judgment be entered against defendants on Count VI of the complaint and that plaintiff be awarded damages in the amount of one hundred and fifty thousand dollars ($150,000.00).

e. That the Court order defendants to account to plaintiff all moneys unlawfully diverted from plaintiff;

f. That the Honorable Court give all such order and further relief as this Court deems just and equitable.

Respectfully submitted: In San Juan, Puerto Rico: On May 10, 1993.

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I hereby certify that a photocopy of the present complaint was sent by certified mail to counsels for defendants to: A.

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